IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE SYNGENTA AG MIR162 CORN LITIGATION	**Master File No. 2:14-MD-02591-JWL-JPO**
THIS DOCUMENT RELATES TO ALL CASES EXCEPT: ***Louis Dreyfus Company Grains Merchandising LLC v. Syngenta AG, et al., No: 16-2788-JWL-JPO*** ***Trans Coastal Supply Company, Inc. v. Syngenta) AG, et al, 2:14-cv-02637-JWL-JPO*** ***The Delong Co., Inc. v. Syngenta AG et al., No. 2:17-cv-02614-JWL-JPO*** ***Agribase International Inc. v. Syngenta AG et al., No. 2:15-cv-02279-JWL-JPO***	**MDL No. 2591**

Report and Recommendation of Special Master Ellen Reisman Regarding Attorneys' Fees, Expenses, and Service Awards

November 21, 2018

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I. INTRODUCTION AND SUMMARY

On February 23, 2018, a nationwide class action settlement was reached between (i) a class of farmers ("Producers"), certain Grain Handling Facilities, and Ethanol Production Facilities and (ii) various Syngenta entities to resolve claims arising from Syngenta's commercialization in the United States of two genetically modified corn seeds under the brand names Agrisure Viptera ("Viptera") and Agrisure Duracade ("Duracade") prior to obtaining China's approval to import corn with those traits. On April 10, 2018, Judge John Lungstrum of the United States District Court for the District of Kansas (defined in the Settlement Agreement as "the Court" or the "MDL Court"[1] and also referred to herein as the "Kansas federal court") granted preliminary approval of that settlement.[2] On November 15, 2018, a Settlement Approval Hearing was held before Judge Lungstrum, at which proponents of the settlement and objectors to it were heard; at the conclusion of that hearing, Judge Lungstrum indicated that he found the settlement to be fair, reasonable, and adequate and indicated that a written order to that effect would follow.[3]

That settlement (as set forth in the Settlement Agreement) provides for payment of a total of $1.51 billion in Gross Settlement Proceeds to Class Members in return for dismissal with

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[1] Settlement Agreement § 2.18, ECF No. 3507-02, filed Mar. 12, 2018. Capitalized terms in this Report and Recommendation have the same definitions as used in the Agrisure Viptera/Duracade Class Settlement ("Settlement Agreement"), unless otherwise indicated. Unless otherwise indicated, (1) all ECF No. cites herein are to documents in MDL 2591 and (2) page cites are to pagination in the original document, not ECF page number.

[2] *See* Memorandum and Order, MDL No. 2591, ECF No. 3531 at 2, entered Apr. 10, 2018.

[3] *See* Minute Entry Regarding Fairness Hearing, ECF No. 3811, entered Nov. 15, 2018.

prejudice of all claims by Class Members, with no admission of liability.[4] The entire $1.51 billion will be paid out; there is no reverter to Syngenta.[5]

The Settlement Agreement provides that attorneys' fees, expenses, and service awards for certain plaintiffs will be paid from the $1.51 billion in Gross Settlement Proceeds.[6] It further provides that the determination and award of attorneys' fees and expenses "shall be separate from [the Court's] determination of whether to approve the Settlement," which "shall nevertheless be binding on the Parties" even if the Court "denies, in whole or in part, the Fee and Expense Applications."[7] The Settlement Agreement contemplates the involvement of Judges Lungstrum, Herndon, and Miller in the allocation of the total Fee and Expense Award.

These unique provisions governing allocation of attorneys' fees and expenses reflect the complexity and expanse of this litigation. The Settlement Agreement resolved claims asserted in both federal (MDL 2591) and state (Minnesota) class actions, as well as in individual lawsuits filed in MDL 2591, the United States District Court for the Southern District of Illinois (the "Illinois federal court"), the Circuit Court of the First Judicial Circuit, Williamson County, Illinois (the "Illinois state court"), the Minnesota Fourth Judicial District Court Hennepin County (the "Minnesota state court" and, collectively with the Court and the Illinois federal court, the "Courts"), and various other jurisdictions.[8]

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[4] Settlement Agreement § 2.32, 3.6.1, ECF No. 3507-02, filed Mar. 12, 2018.

[5] *Id.* §§ 2.32, 3.7.1, 3.7.2 (allocation methodology).

[6] Settlement Agreement §§ 7.2, 9.18.

[7] Settlement Agreement § 7.2.2.

[8] *See* Settlement Agreement Exhibit 1.

At the November 15, 2018 hearing, Judge Lungstrum found that an award of one-third of the Gross Settlement Proceeds ("Attorneys' Fee Award") would be appropriate, taking into account the factors articulated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), and approved in the 10th Circuit.[9] He then appointed Ellen Reisman as Special Master to render a Report and Recommendation on the allocation of fees, expenses, and service awards, with such report to be filed no later than November 21, 2018. He further set a December 17, 2018 hearing before Judges Lungstrum, Herndon, and Miller to address allocations of fees among the jurisdictions and approval concerning expenses and service awards.[10] Set forth herein is the Special Master's Report and Recommendation.

The allocation of the Attorneys' Fee Award among the three jurisdictions requires the Courts to address some key issues:

1. In this "hybrid" class action settlement context, what attorney time can fairly be considered work for the "common benefit";
2. The enforceability of private contingent fee agreements entered into by certain Class Members prior to settlement, and the extent to which the Settlement Court (or the Illinois federal court or the Minnesota state court) can invalidate or modify those agreements;
3. What weight should be given to the Fee-Sharing Agreement (Exhibit 1 hereto) entered into by certain counsel immediately after execution of the Settlement Agreement on February 23, 2018;
4. The applicability of the Joint Prosecution Agreements (the "JPAs") entered into by certain counsel in 2015; and

[9] The term "Attorneys' Fee Award' is used throughout the Report and Recommendation to refer to the award by Judge Lungstrum of one-third of the Gross Settlement Proceeds in attorneys' fees in connection with the nationwide class action settlement.

[10] *See* Order Appointing Special Master, ECF No. 3812, entered Nov. 15, 2018; Notice of Hearing, ECF No. 3813, entered Nov. 15, 2018.

5. Application of allocation principles to the various fee applications and data submitted.

Judge Lungstrum further found at the November 15, 2018 hearing that an award of expenses up to approximately $48 million would be reasonable, subject to the Special Master's review and recommendation; likewise, service awards would be appropriate, again subject to the Special Master's review and recommendation.

This Report and Recommendation addresses these issues, taking into account the voluminous submissions of the parties, the history of the multi-jurisdictional Syngenta corn litigation, and applicable law regarding attorneys' fees in hybrid class action settlements, such as this one, which resolve both multiple class actions and individual claims.

In summary, the Recommendations are as follows:

1. The Courts should allocate the Attorneys' Fee Award so as to provide compensation both to those lawyers whose efforts produced common benefits to the entire Class and to individually retained private attorneys ("IRPAs") representing individual Class Members pursuant to contingent fee agreements. The Attorneys' Fee Award, plus expenses as approved by the Courts, should be the entire amount paid to any lawyers in connection with this litigation and settlement, notwithstanding any agreements (*e.g.*, JPAs or contingent fee agreements) to the contrary.

    a. Specified percentages of the Attorneys' Fee Award as set forth below should be allocated to each of the three jurisdictions to which certain groups of counsel have been assigned. These amounts should be allocated by the respective Courts among those counsel for efforts that produced common benefits to the Class.

    b. A set percentage of the Attorneys' Fee Award should be placed into a pool for allocation among IRPAs based on their clients' proportionate share of settlement payments, as finally determined by the Settlement Process. (As discussed below, the Special Master recommends that 10% of the Attorneys' Fee Award should be placed in the IRPA pool.)

    c. IRPA compensation in respect of individual clients should be limited to a share of the IRPA pool. The IRPA pool will be allocated among IRPAs

based upon their clients' proportionate share of settlement awards to Class Members represented by IRPAs. Contingent fee agreements providing for higher percentages should not be enforceable beyond the amount of the IRPA pool share. This will effectively cap IRPAs' contingent fee agreement recoveries for individual benefit work at the percentage afforded by the IRPA allocation process, which the Special Master recommends should not exceed a contingency fee of 10% of their clients' settlement recovery.

d. Some law firms will be entitled to both common benefit fees and IRPA compensation.

2. A preliminary analysis with respect to reimbursable expenses is set forth in section V. The Special Master recommends that the Court set aside the entire $$48,842,866.12 requested for reimbursement of expenses, with final determinations and allocations to be made after the Special Master has reviewed supporting materials and made more specific recommendations.

3. We recommend that the Courts award service payments to certain plaintiffs as set forth below in section VI.

II. FACTUAL BACKGROUND

A. Overview of Litigation

The determination of a reasonable and fair attorneys' fee award from a common fund and the appropriate allocation of that award among counsel necessarily requires consideration of the contributions made by various counsel to the litigation.[11] Counsel's petitions contain extensive discussions of the history of the litigation and the role each counsel claims to have played in achieving the settlement. While some of the litigation events that are most relevant to assessing counsel's contributions are summarized below, it is clear that no single event or group of plaintiffs' counsel was solely responsible for pushing this litigation to resolution.

[11] *See* Fed. R. Civ. P. 23(h) and comment on 2003 amendment; *Gottlieb v. Barry*, 43 F.3d 474, 489 (10th Cir. 1994); *In re National Football League Players' Concussion Injury Litigation*, ("*NFL*") MDL No. 2323, 2018 WL 1635648 (E.D. Penn. Apr. 5, 2018), *appeals pending*, No. 18-202 (3d Cir. Filed May 3, 2018); *see generally infra* § III.A.

By late 2017, multiple litigation pressures led Syngenta finally to commit to settlement. Courts had certified classes in multiple states. Syngenta had suffered a loss in the Kansas class action trial, and it was facing the risk of a similar loss in the Minnesota class trial that was ongoing when a settlement was reached. It is clear that if one extrapolated the Kansas class verdict to the Minnesota trial and other trials that had been set to take place in 2017 and 2018, Syngenta was facing a financial risk of many billions of dollars. Loss of its "no duty" defense in the Kansas federal court, the Illinois federal court, the Illinois state court, and the Minnesota state court clearly put pressure on Syngenta as it faced the prospect of long and potentially unsuccessful appeal processes in multiple jurisdictions. But, in assessing the contributions of plaintiffs' counsel, it is also important to recognize that it was not just the Kansas and Minnesota class litigation that brought about the settlement. The collective weight of the litigation, including both the class trials and the thousands of individual lawsuits, combined with the possibility of years of additional and expensive litigation and trials in multiple jurisdictions, all helped to pressure Syngenta to negotiate an expansive and fair settlement.

1. Kansas Federal Court Litigation

On November 11, 2014, Don Downing, Scott Powell, and William Chaney filed two of the initial nationwide class action complaints against Syngenta – *Five Star Farms* in District of Kansas (along with Patrick Stueve) and *Wilson Farm* in the Eastern District of Missouri.[12]

[12] *See* Class Action Compl., *Five Star Farms, et al. v. Syngenta AG et al.*, No. 2:14-cv-02571 (D. Kan. Nov. 11, 2014); Class Action Compl., *Wilson Farm Inc., et al. v. Syngenta AG et al.*, No. 4:14-cv-01908 (E.D. Mo. Nov. 11, 2014).

Those complaints asserted claims on behalf of farmers in 19 states seeking to represent a nationwide class.[13]

On December 11, 2014, the Judicial Panel on Multi-District Litigation ("JPML") centralized all pretrial proceedings against Syngenta in MDL 2591 in the Kansas federal court before Judge Lungstrum and Magistrate Judge O'Hara.[14]

In an order entered on January 22, 2015, the Kansas federal court appointed as "co-lead counsel" for the Kansas MDL Messrs. Downing, Chaney, Powell and Stueve ("Kansas MDL Leadership"), and formed a Plaintiffs' Executive Committee consisting of Jayne Conroy, Christopher Ellis, David Graham, Richard Paul III, Robert Shelquist, John Ursu, Stephen Weiss, Tom Cartmell, Scott Poynter, and Tom Bender.[15] The order authorized Kansas MDL Leadership, in their role as co-lead counsel, to "organize and supervise the efforts of plaintiffs' counsel in a manner to ensure that the pretrial and trial preparation for the plaintiffs is conducted effectively, efficiently, expeditiously, and economically" and "to encourage full cooperation and efficiency among all plaintiffs' counsel."[16]

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[13] *Id; see also* Memorandum in Support of Kansas Co-Lead Counsel and Settlement Class Counsel Christopher Seeger's Petition for Award of Attorneys' Fees ("Kansas MDL Fee Memo"), ECF No. 3587 at 5, filed July 10, 2018.

[14] JPML Transfer Order, ECF No. 1, entered Dec. 22, 2014.

[15] *See* Order Concerning Appointment of Counsel, ECF No. 67, entered Jan. 22, 2015. Tom Cartmell and David Graham later withdrew from the Plaintiffs' Executive Committee. *See* Order, ECF No. 891, entered June 26, 2015 and Order, ECF No. 3498, entered Feb. 27, 2018.

[16] ECF No. 67 at 6-9.

Plaintiffs' counsel primarily from the Kansas MDL Leadership (in coordination with the Minnesota and Illinois groups discussed below) engaged in extensive preliminary pleading and motion practice, starting in early 2016. These filings included:

1. Successful oppositions by counsel in the Minnesota state court actions and Kansas MDL Leadership to Syngenta's efforts to remove various state court cases to federal court. As a result, Syngenta continued to face litigation in multiple forums.[17]

2. Oppositions to motions to dismiss on various grounds, including that Syngenta did not owe any duty to plaintiffs, that plaintiffs' claims were preempted under FIFRA, and that the claims were barred by the economic loss doctrine.[18] Lead plaintiffs' counsel in the various jurisdictions, beginning with the Kansas MDL and thereafter the Minnesota consolidated litigation and the Illinois federal and state litigation, opposed Syngenta's motions, generally successfully.[19]

3. Successful opposition by lead plaintiffs' counsel to Syngenta's third-party claims against various Grain Trade entities.[20]

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[17] *See* Memorandum and Order, ECF No. 395, entered May 5, 2015; Kansas MDL Fee Memo at 17; Bassford Remele, P.A.'s Memorandum of Law Regarding Allocation of Attorney's Fees ("Remele Fee Petition"), ECF No. 3568, at 7, filed July 10, 2018.

[18] Memorandum In Support of Minnesota Co-Lead Class Counsel's Joint Motion For Approval Of Common Benefit Awards ("Gustafson Minnesota Class Memo") at 10 (4th Jud. Dist. Ct., Minn. July 10, 2018).

[19] *See* Order, Motion to Dismiss, *In re: Syngenta Litigation*, 27-CV-15-3785, (Dist. Ct. Minn. Apr. 7, 2016); Gustafson Minnesota Class Memo, Gustafson Decl. at ¶ 13, filed July 10, 2018; Order, ECF. No 1016, filed Sept. 11, 2016; Memorandum Brief in Support of Joint Motion for Award of Attorney's Fees and Reimbursement of Litigation Expenses ("Clark/Phipps Memo"), ECF No. 3598, at 11, filed July 10, 2018. *But see Fostoria Ethanol, LLC v. Syngenta Seeds, Inc.*, No. 15-cv-0323 (Ohio Ct. Com. Pl. June 28, 2017) (granting Syngenta's motion to dismiss on grounds of lack of duty).

[20] *See, e.g.*, Kansas MDL Fee Memo at 17; Answer to Non-Producers Plaintiffs' Second Amended Master Class Action Complaint, ECF No. 1224, filed Nov. 19, 2015; Motion to Dismiss Syngenta's Counter Claims and Third Party Complaints, ECF No. 1434, filed Jan. 19, 2016; Memorandum in Support of Motion to Dismiss, ECF No. 1435, filed Jan. 19, 2016.

The Kansas MDL Leadership took the lead with respect to discovery; they report that they reviewed more than 2.5 million pages of documents, took or defended 200 depositions, produced eight expert reports, cross-examined 11 defense experts,[21] filed 36 substantive motions, and responded to 19 substantive motions.[22] In addition, Kansas MDL Leadership prepared 126 Rule 30(b)(6) deposition topics for Syngenta and later deposed all 32 Syngenta witnesses.[23] Eighteen of those depositions were later shown in the June 2017 Kansas class action trial before Judge Lungstrum.[24] The preparation for and questioning of Syngenta's witnesses required travel in the United States, Great Britain, Australia, and China.[25]

Kansas MDL Leadership also participated in third-party discovery against Louis Dreyfus Commodities LLC ("Louis Dreyfus"); Bunge North America, Inc. ("Bunge"); Gavilon Grain, LLC ("Gavilon"); CHS Inc.; the American Soybean Association; and CropLife America [26] and

[21] Kansas MDL Fee Memo at 2.

[22] *Id.*

[23] *Id.* at 10.

[24] *Id.*

[25] *Id.* at 11.

[26] *Id.*

their respective affiliates, and participated in non-party discovery and over 49 depositions in the Louisiana,[27] Kansas MDL and Minnesota litigation.[28]

2. Minnesota State Court Litigation

Throughout 2015, farmers represented by Bassford Remele, P.A., Watts Guerra LLP, and several other firms brought individual and class action lawsuits in Minnesota state court against Syngenta.[29] On May 22, 2015, the Minnesota Supreme Court ordered consolidation of the Minnesota class action and individually filed claims against Syngenta, in the Minnesota state court before Judge Thomas Sipkins.[30]

The Minnesota state court, like the Kansas federal court, appointed leadership to assure the efficient, coordinated litigation of the Minnesota cases. On August 5, 2015, the Minnesota state court appointed a Minnesota Plaintiffs' Executive Committee of Lewis A. Remele, Jr., Francisco Guerra IV, Daniel E. Gustafson, Mikal C. Watts, Richard M. Paul III, Robert K. Shelquist, Will Kemp, Tyler Hudson, Clayton Clark (who later resigned), Paul Byrd, and William R. Sieben (collectively "Minnesota Leadership").[31] Messrs. Remele and Guerra were

[27] Related litigation against Syngenta was filed in Louisiana state court by Grain Trade parties, Archer Daniels Midland Company ("ADM") and Cargill Inc. ("Cargill"), and their respective affiliates. *See Archer Daniels Midland Co. v. Syngenta Corp. et al.*, No. 79,219 (29th Jud. Dist. Ct., La. filed Nov. 19, 2014) (St. Pierre, J.); *Cargill, Inc. et al. v. Syngenta AG et al.*, No. 67,061 (40th Jud. Dist. Ct., La. filed Sept. 9, 2014) (Jasmine, J.). The ADM litigation has been resolved.

[28] Kansas MDL Fee Memo. at 13.

[29] *See* Remele Fee Petition at 6-7, filed July 10, 2018.

[30] Minnesota Consolidation Order, No. 27-cv-15-3785 (4th Jud. Dist. Ct., Minn. May 22, 2015). Judge Laurie Miller later succeeded Judge Sipkins upon his retirement.

[31] Order Appointing Lead Counsel, No. 27-cv-15-3785, (4th Jud. Dist. Ct., Minn. Aug. 5, 2015).

appointed Co-Lead Counsel, while Messrs. Gustafson and Sieben were appointed Interim Co-Lead Class Counsel.[32] Messrs. Remele and Guerra were authorized to, among other duties, organize and supervise the litigation efforts of plaintiffs in the consolidated cases.[33]

Minnesota Leadership coordinated with Kansas MDL Leadership and assisted in the motion practice described above. They also undertook extensive discovery against Syngenta by retaining, in addition to the joint MDL experts, 11 experts for the Minnesota bellwether trials.[34] These experts were deposed by Syngenta, and Minnesota Leadership also deposed Syngenta's expert witnesses.

3. Illinois Federal Court Litigation

Active and aggressive litigation occurred not only in the Kansas MDL and in Minnesota, but also in the Illinois federal court. Three original complaints were filed in the fall of 2015 in the Third Judicial Circuit of Madison County, Illinois – *Poletti*, filed on behalf of 123 plaintiffs; *Brase Farms*, filed on behalf of 1,228 plaintiffs; and *Wiemers Farms*, filed on behalf of 1,431 plaintiffs.[35] Heninger Garrison Davis, LLC filed the *Poletti* case as a mass action to "create a new front [to] exert additional pressure on Syngenta by creating another jurisdiction where it

[32] *Id.*

[33] *Id.* at 2.

[34] See Gustafson Minnesota Class Memo at 11-14, 16.

[35] *See* Compl., *Poletti, et al., v. Syngenta AG et al.*, No. 15-L-1219 (S.D. Ill. Sept. 18, 2015); Compl., *Brase Farms, et al., v. Syngenta AG et al.*, No. 15-L-1483d (Nov. 16, 2015); Compl., *Wiemers Farms, et al., v. Syngenta AG, et al.*, No. 15-L-1504 (Nov. 17, 2015). These cases were later consolidated under *Poletti, et al. v. Syngenta AG, et al.*, 15-cv-1221 (S.D. Ill.).

would have to expend resources defending claims…" and successfully did so.[36] On February 18, 2016, three federal actions involving 2,800 claims filed in Illinois federal court were consolidated in *Tweet, et al. v. Syngenta, AG et al.* and *Poletti, et al. v. Syngenta AG, et al.* in the Illinois federal court.[37] On March 10, 2016, Clayton Clark, Martin Phipps, and Peter Flowers (the "Clark/Phipps group") were appointed lead counsel in *Tweet*.[38] On the same day, Heninger Garrison Davis, LLC was appointed lead counsel in *Poletti*.[39] In addition to representing thousands of Producers, the Clark/Phipps group represented over 20 Grain Handling Facilities in claims against Syngenta.[40]

In both *Tweet* and *Poletti*, the Clark/Phipps group and Heninger Garrison Davis, LLC briefed motions on issues including duty, breach, causation, federal preemption, service, discovery, and case scheduling.[41] The Clark/Phipps group and Heninger Garrison Davis, LLC also appeared in numerous hearings and presented oral arguments on motions to dismiss.[42] As a

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[36] *See* Fee and Expenses Application of Heninger Garrison Davis, LLC and Its Co-Counsel ("Garrison Fee Memo"), 3:15-cv-01221-DRH, ECF No. 349 at 14, filed on July 10, 2018.

[37] *See* Scheduling Order, No. 3:15-cv-01221-DRH, (S.D. Ill. March 10, 2016); *see also* Settlement Coordination Oder, No. 3:15-cv-01221-DRH, (S.D. Ill. Feb. 26, 2016); *see generally Tweet, et al. v. Syngenta AG, et al.*, No. 3:16-cv-00255, and *Poletti, et al. v. Syngenta AG et al.*, No. 3:15-cv-01221.

[38] Scheduling Order, No. 3:15-cv-01221-DRH, (S.D. Ill. March 10, 2016).

[39] *Id.*

[40] Memorandum Brief in Support of Joint Motion for Award of Attorneys' Fees and Reimbursement of Litigation Expenses ("Clark/Phipps Memo"), ECF No. 3598, at 11 (filed July 10, 2018).

[41] *Id.*

[42] *Id.*

result, on May 15, 2017, the Illinois federal court largely denied Syngenta's motions to dismiss based on issues of duty, breach, causation, federal preemption, and the economic loss doctrine.[43]

The Clark/Phipps group initiated 456 discovery requests on Syngenta in Illinois federal and state court and participated in several meet and confer conferences concerning them.[44] In response to the extensive discovery requests, Syngenta produced 1.2 million pages of documents pertinent to claims and defenses in Illinois.[45] In addition to motion practice and discovery, the Clark/Phipps group and Heninger Garrison Davis, LLC each worked with a team of expert economists to develop economic damages models against Syngenta.[46]

Heninger Garrison Davis, LLC also worked cooperatively with Kansas MDL Leadership. They participated in depositions by telephone (to save costs) and pursued lines of questioning used at the Kansas class trial.[47]

In Illinois, Heninger Garrison Davis, LLC and its affiliated firms estimate that they spent 2,400 hours preparing and submitting PFSs.[48] Along with the Clark/Phipps group, they also initiated new discovery against Syngenta.[49] After class certification was granted in the Kansas

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[43] Order, *In re Syngenta Mass Tort Actions*, No. 3:16-CV-00255-DRH, 2017 WL 2117728, at *1 (S.D. Ill. May 15, 2017); *see also* Kansas MDL Fee Memo at 31; Clark/Phipps Memo at 11.

[44] *See* Clark/Phipps Memo at 13.

[45] *Id.*

[46] *See* Clark/Phipps Memo at 15; Garrison Fee Memo at 13.

[47] *See* Garrison Fee Memo at 12-16.

[48] *Id.* at 17.

[49] *See* Clark/Phipps Memo at 13.

federal court and Minnesota state court, the Clark/Phipps group helped clients submit more than 16,000 opt-out forms, assuring that the Illinois litigation remained as a significant additional battlefront for Syngenta.[50]

4. Illinois State Court Litigation

On March 8, 2016, 200 individual Producer claims represented by the Clark/Phipps group filed consolidated complaints in Illinois state court, were coordinated and placed before the Illinois state court.[51] On October 15, 2015, the Illinois state court appointed the Clark/Phipps group as "Illinois Leadership" for the entire state court litigation.[52] In Illinois state court, the Clark/Phipps group also faced Syngenta's motions to dismiss based on duty, federal preemption, and the economic loss doctrine.[53] As in Illinois federal court, they were successful in opposing these motions.[54]

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[50] *Id.* at 12.

[51] *See* Settlement Coordination Order, No. 3:15-cv-01221-DRH, (S.D. Ill. Feb. 26, 2016); *see also* Amended Compl., *Browning v. Syngenta Seeds, Inc., et al.*, No. 15-L-157 (Ill. Cir. Ct. filed March 3, 2016). The Law Offices of A. Craig Eiland, PC also represented 1146 producers and landlords in litigation against Syngenta, including more than 834 clients in the Illinois state court. *See* Declaration of A. Craig Eiland in Support of the Eiland Law Firm's Motion for Award of Attorneys' Fees and Reimbursement of Expenses ¶¶ 3, 14, ECF No. 3593-1, filed July 10, 2018.

[52] Order Appointing Lead Counsel for Litigation, No. 15-L-157, *Browning, et al.*, (Ill. Cir. Ct. Oct. 15, 2015).

[53] Clark/Phipps Memo at 11.

[54] *Id.*

5. Ethanol Plant Litigation in Indiana, Iowa, Michigan, Nebraska, and Ohio

In state courts in Iowa, Indiana, Ohio, Michigan, and Nebraska, the Clark/Phipps group pursued state-wide class action litigation against Syngenta on behalf of ethanol plants and biorefineries.[55] That group was the only counsel to do so and was responsible for briefing all related legal issues and pursuing all discovery in those cases.

6. Class Certification and Trials in Kansas and Minnesota

Lead counsel in the Kansas and Minnesota class actions successfully briefed and argued significant, hard fought motions for class certification, which resulted in one nationwide class and nine state litigation classes.[56] They also presented expert reports, defended expert depositions, and appeared at a joint hearing conducted before Judges Lungstrum and Sipkins in Kansas City.[57]

Both the Kansas MDL Leadership and Minnesota Leadership expended substantial effort on bellwether and class action trials. On April 26, 2017, led by Minnesota Leadership, the first Minnesota bellwether trial (*Mensik*) began before Judge Sipkins.[58] However, due to a jury issue

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[55] *TCA, LLC v. Syngenta Seeds, Inc.*, District Court for Carroll County, Iowa, Case No. EQCV 039491; *Ultimate Ethanol, LLC v. Syngenta Seeds, Inc., et al.*, Madison County, Indiana Superior Court, Case No. 48C05-1512-CT-000184; *Fostoria Ethanol, LLC v. Syngenta Seeds, Inc., et al.*, Court of Common Pleas of Seneca County, Ohio, Case No. 15-cv-0323; *Michigan Ethanol, LLC v. Syngenta Seeds, LLC et al.,* 54th Circuit Court for the County of Tuscola, Michigan, Case No. 17-29831-NZ.

[56] *See* Motion for Preliminary Approval, ECF No. 3507, Ex. A, Ex. 1.

[57] *See* Memorandum and Order, ECF No. 2547, entered Sept. 26, 2016; *see also* Gustafson Minnesota Class Fee Memo at 15.

[58] *See* Amended Trial Order, *Daniel Mensik v. Syngenta*, No. 27-cv-15-16826 (4th Jud. Dist. Ct., Minn. May 24, 2016); *see also* Gustafson Minnesota Class Memo at 20-21.

prior to opening statements, a mistrial was declared.[59] The case had however been completely worked up and was ready to go.[60] The *Mensik* trial was rescheduled for July 2017, but prior to the trial, Syngenta and Mensik settled.[61]

The June 2017 Kansas class action trial lasted for three weeks and resulted in a $217.7 million verdict in favor of Plaintiffs.[62] Preparation for the trial was extensive, with Syngenta identifying 12 potential live witnesses and 54 potential depositions offered into evidence.[63] Kansas MDL Leadership identified 21 potential live witnesses and prepared for their possible examination.[64] At the close of the plaintiffs' case-in-chief, Syngenta filed a Motion for Summary Judgment and four hours later, Kansas MDL Leadership filed an opposition.[65] The following day, Syngenta's motion was largely denied.[66]

The Minnesota class trial, which began on September 11, 2017, was underway during the last several weeks of the settlement negotiations that resulted in a term sheet being signed on September 25, 2017. The jury had been seated, opening statements had been made, and several

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[59] *Id.*

[60] *See* Gustafson Minnesota Class Memo at 20-21.

[61] *Id.*

[62] Jury Verdict Form, ECF No. 3304, entered June 23, 2017; Judgment, ECF No. 3312, entered June 23, 2017.

[63] *See* Kansas MDL Fee Memo at 26-27.

[64] *See* Kansas MDL Fee Memo at 26.

[65] *Id.* at 27.

[66] *Id.*

witnesses had been presented before Judge Miller terminated the trial upon the parties' announcement of a global settlement.[67]

There were also four other trials scheduled before Judge Lungstrum in 2017 and 2018, which were deferred and subsequently adjourned after settlement was reached.[68] And, there was the prospect of hundreds or even thousands of trials in individual cases.

B. Settlement Negotiations

1. March 2016 Appointment of Special Master

The settlement process began in March 2016 when the Kansas federal court, the Illinois federal court, the Minnesota state court, and the Illinois state court all appointed Ellen Reisman as Special Master for Settlement in the Syngenta corn litigation that was pending before them.[69] Those orders directed the Special Master to, among other things:

- Order the parties to meet face-to-face and engage in serious and meaningful settlement negotiations;
- Construct an efficient process to engage the parties in settlement negotiations;
- Order the appearance of any persons necessary to settle any claims completely; and

[67] *See* Hr'g Tr. of Settlement Status Conference held Dec. 19, 2017, ECF No. 3485, 14-16, filed Dec. 20, 2017.

[68] *See* Memorandum and Order, ECF No 3319 at 26-27, entered July 6, 2017; *see also* Kansas MDL Fee Memo at 26-27.

[69] *See* Order Appointing Special Master, ECF. No. 1745, at 2, entered March 23, 2016; Order Appointing Special Master, *In re Syngenta*, No. 27-cv-15-3785, at 6 (4th Jud. Dist. Ct., Minn. March 23, 2016); Order Appointing Special Master, *Poletti, et al. v. Syngenta AG, et al*, at 7 (S.D. Ill. March 23, 2016); Order Appointing Special Master, *Tweet, et al. v. Syngenta AG, et al.*, at 7 (S.D. Ill. March 23, 2016); Order Appointing Special Master, *Browning v. Syngenta Seeds, Inc. et al*., No. 15-L-157, at 6 (Ill. Cir. Ct. March 31, 2016); *see also Cargill, Inc. et al. v. Syngenta AG et al.*, No. 67,061, at 6 (40th Jud. Dist. Ct., La. July 7, 2016).

- Make recommendations to the courts concerning any issues that may require resolution in order to facilitate settlement.

The Special Master was required to meet monthly with the parties. She was permitted to communicate *ex parte* with the Courts and with the parties and their counsel.[70]

2. Initial Settlement Discussions in 2016 and 2017

Shortly after issuance of the Special Master appointment orders, the Special Master (along with other lawyers from her firm including Andrew Karron, Dorian Hurley, and Amy Rohe) commenced a series of meetings involving the various parties – Syngenta, multiple plaintiffs' counsel groups, and counsel for the Grain Trade parties (Cargill, ADM, Louis Dreyfus, Bunge). Initially the meetings were held separately with Syngenta counsel, the Grain Trade counsel, and certain groups of plaintiffs' lawyers (described below). The first settlement meeting of counsel for all parties was held on May 25, 2016 in the federal district court in Kansas.

Several significant obstacles to settlement quickly emerged.

First, Syngenta was initially resistant to pursuing settlement discussions. Counsel for Syngenta informed the Special Master that discussions of settlement prior to completion of the then-pending acquisition of Syngenta by ChemChina would be premature. Counsel also repeatedly expressed the view that Syngenta did not have liability and thus was not able to discuss settlement. In addition, counsel for Syngenta indicated that the requirements of litigation made it difficult for them to engage in regular settlement discussions. The Special Master

[70] *Id.*

addressed this issue by requesting that Syngenta appoint a team of lawyers who could devote themselves exclusively to settlement.

Second, a lack of cooperation among the plaintiffs' lawyers presented a significant obstacle to settlement. The multiple factions of plaintiffs' lawyers had divergent interests, expectations, and ideas regarding how to resolve the litigation, as well as various degrees of personal animosity stemming largely from experiences in other prior litigation. The Grain Trade parties viewed themselves exclusively as plaintiffs suing Syngenta but were viewed by Syngenta and at least one plaintiffs' counsel group as defendants, further preventing progress.

The factions among plaintiffs' counsel generally can be categorized as follows:

- Kansas MDL Leadership, led by Patrick Stueve of Stueve, Siegel, Hanson, LLP; William Chaney of Gray Reed & McGraw, LLP; Don Downing of Gray, Ritter & Graham, PC; and Scott Powell of Hare, Wynn, Newell & Newton, LLP, favored a producer class action settlement. Their view of the case differed somewhat from that of certain lawyers representing individual producer claimants. Additionally, there was a difference of opinion between the Kansas MDL Leadership and Minnesota Leadership as to how any settlement would treat Minnesota Producers. Messrs. Stueve, Chaney, Downing, and Powell were also extremely busy with the ongoing litigation and suggested that they would rotate responsibility for attending settlement meetings. The Special Master informed them that they needed to have counsel dedicated exclusively to settlement discussions, and they selected Seeger Weiss LLP to serve as settlement counsel.
- Minnesota Leadership included two groups that worked in close coordination – those pursuing a Minnesota class and those with individual plaintiff lawsuits filed in Minnesota. Daniel Gustafson of Gustafson Gluek PLLC led the team of Minnesota class action lawyers, while Mikal Watts of Watts Guerra LLP and Lewis Remele of Bassford Remele, P.A. acted as the lead counsel for individual plaintiffs. Mr. Gustafson participated actively and constructively in settlement discussions from the outset. John Cracken of The Cracken Law Firm, PC participated for some time on behalf of Watts Guerra LLP. Mr. Cracken and Watts Guerra LLP strongly opposed any class resolution.[71] The damage model

[71] Notwithstanding this stated position, Mr. Watts participated as co-counsel in the class action trial that began in Minnesota in September 2017 and relies on that involvement as justification in

put forth by the lawyers for individual Producers in Minnesota differed from that supported by the Kansas MDL Leadership and the Minnesota class. Unlike the Clark/Phipps group in Illinois, Watts Guerra LLP and Bassford Remele, P.A., representing individual producer plaintiffs in Minnesota, had not brought claims against the Grain Trade parties.

- Illinois counsel included two principal groups of plaintiffs' counsel representing plaintiffs with cases filed in the Illinois federal court: (1) W. Lewis Garrison of Heninger Garrison Davis, LLC and (2) the Clark/Phipps group, led by Martin Phipps of Phipps Anderson Deacon, LLP and Clayton Clark of Clark, Love & Hutson, GP, along with Peter Flowers of Meyers & Flowers, LLC.
    - Heninger Garrison Davis, LLC represented thousands of producer plaintiffs with filed lawsuits in the Illinois federal court. The Heninger Garrison Davis, LLC group entered into a JPA with Kansas MDL Leadership and participated in discovery against Syngenta. Mr. Garrison was part of the early settlement discussions and was always constructive and cooperative with the Special Master.
    - The Clark/Phipps group pursued both Syngenta and the Grain Trade parties as defendants both before Judge Herndon in Illinois federal court and before Judge Bleyer in Illinois state court.[72] All other plaintiffs' counsel had rejected this approach and some (*e.g.*, Kansas MDL Leadership) were affirmatively hostile to it and were in fact working in cooperation with counsel for the Grain Trade parties (*e.g.*, John Ursu of Greene Espel PLLP, who represents Cargill). Moreover, the Clark/Phipps group favored an individually determined damages model distinct from the class models advocated by other Producer counsel.
- The Grain Trade parties (Cargill, ADM, Louis Dreyfus, Bunge) generally appeared to cooperate with each other, but had somewhat divergent interests. All Grain Trade parties were united in the position that they would only come to the table as plaintiffs, not as defendants, a position that was ultimately borne out by the various courts' rulings on this issue. Moreover, the Grain Trade parties had completely different damage models from any of the Producer plaintiffs, because they were based on costs incurred from rejection or impoundment of corn and

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part for his claim for common benefit fees. *See* Memorandum in Support of the Fee and Expense Application by Watts Guerra LLP ("Watts Guerra Memo"), ECF No. 3611, at 19-20, filed July 16, 2018.

[72] *See* Amended Consolidated Complaint, *Browning v. Syngenta Seeds, Inc. et al.*, No. 15-L-157 (Ill. Cir. Ct. March 8, 2016); Amended Consolidated Complaint, *Tweet, et al. v. Syngenta AG, et al.*, (S.D. Ill. March 11, 2016).

> alleged lost value of investments in Chinese business, not on a reduction in the Chicago Board of Trade price of corn. It was agreed early in the discussions to separate out the Grain Trade parties from discussions with the other plaintiff groups.

Regular meetings with the separate groups of plaintiffs' counsel and Syngenta counsel, as well as group meetings, were held in the spring and summer of 2016. As the Special Master advised the courts in August 2016, the lack of progress in that time period led the Special Master to become concerned about the good faith involvement of the parties in the settlement discussions. At a status conference on August 18, 2016 in the Illinois federal court, counsel for all parties were asked on the record to affirm their willingness to mediate in good faith pursuant to the courts' orders.[73] All did so. Meetings continued after that conference, but with limited progress. The principal points of dispute were:

1. Syngenta's settlement counsel's position that the most they could discuss was structure, not dollars, pending consummation of the ChemChina transaction;
2. The insistence by multiple members of the various plaintiffs' counsel factions that they all be "in the room" for negotiations, making those negotiations unwieldy and contentious;
3. Plaintiffs' counsel's inability or unwillingness to put aside differences and unite on a common proposal to Syngenta; and
4. Syngenta's insistence that any settlement had to include participation of all key plaintiffs' groups.

Ultimately in January 2017 plaintiffs' counsel presented a written settlement proposal that Syngenta rejected and did not counter. The Special Master concluded that further negotiations at that time were futile, and so informed the courts. No further settlement discussions occurred until later that year, after the litigation landscape had begun to change in

[73] *See* Hr'g Tr. of Settlement Status Conference held Dec. 19, 2017, at 14-16.

significant ways. In April 2017, the *Mensik* trial started in Minnesota state court, but a mistrial was declared[74]; in June 2017, a verdict of $217.7 million was rendered in the Kansas class action trial before Judge Lungstrum[75]; a Minnesota class trial was set for September 2017; and another class trial was set for October 2017 before Judge Lungstrum.

3. August 2017 Appointment of Plaintiffs' Settlement Negotiating Committee

Shortly after the conclusion of the Kansas class trial, Leslie Smith (who had been one of Syngenta's trial lawyers) indicated to the Special Master that Syngenta would be willing to resume settlement discussions. A meeting was held with Christopher Seeger on behalf of the Kansas MDL Leadership, Ms. Smith, and the Special Master. It was agreed that negotiations should resume promptly between a small negotiating team on behalf of the plaintiffs and Ms. Smith (along with Patrick Haney) on behalf of Syngenta. The Special Master so informed the Courts.

Thereafter, in early August 2017, the Courts issued parallel orders appointing a Plaintiffs' Settlement Negotiating Committee ("PSNC") with representatives of all the major plaintiffs' constituencies.[76] Those orders provided:

> In order to facilitate the goals of the appointment of the Special Master for Settlement, and after consultation with Special Master Reisman and judges from the federal and state courts listed above, who are presiding over the Syngenta corn litigation, the Court

[74] *See* Amended Trial Order, *Daniel Mensik v. Syngenta*, No. 27-cv-15-16826 (4th Jud. Dist. Ct., Minn. May 24, 2016).

[75] Jury Verdict Form, ECF No. 3304.

[76] *See* Order Appointing Plaintiffs' Settlement Negotiation Committee ("PSNC") In The Syngenta Litigation, ECF No. 3366, filed Aug. 9, 2017; Order Appointing PSNC (4th Jud. Dist. Ct., Minn. Aug. 9, 2017); Order Appointing PSNC (S.D. Ill. Aug. 9, 2017).

> finds it prudent and efficient to appoint a Plaintiffs' Settlement Negotiation Committee to work toward a fair and expeditious resolution of the matters discussed above. This Plaintiffs' Settlement Negotiation Committee shall conduct settlement negotiations with Syngenta and Special Master Reisman, shall confer with other Plaintiffs' counsel in the actions described above about such negotiations, and shall participate in such negotiations on their behalf. The Court's judgment is that the Plaintiffs' Settlement Negotiation Committee appropriately balances the goals of representing the interests of different groups of producer plaintiffs while maintaining a workably sized group to conduct settlement negotiations. The Court anticipates that members of the Plaintiffs' Settlement Negotiation Committee will communicate with their co-counsel regarding settlement negotiations so that producer plaintiffs' interests are appropriately represented.
>
> IT IS HEREBY ORDERED that Christopher A. Seeger, of Seeger Weiss LLP; Mikal Watts, of Watts Guerra LLP; Clayton A. Clark, of Clark, Love & Hutson, GP; and Daniel E. Gustafson, of Gustafson Gluek PLLC are appointed as the Plaintiffs' Settlement Negotiation Committee. The Plaintiffs' Settlement Negotiation Committee, Special Master Reisman, and Syngenta will report on a weekly basis to the Honorable David R. Herndon. Judge Herndon will communicate, on a regular basis, the progress of the Committee to the presiding judges in the federal and state court cases described above.[77]

The PSNC began meeting immediately upon issuance of these orders on a weekly basis with Special Master Ellen Reisman, the Honorable Daniel J. Stack (ret.) (who had been previously appointed Special Master for discovery matters in the Illinois federal court and who in August was appointed to assist in mediating settlement discussions as well), and Ms. Smith and Mr. Haney on behalf of Syngenta.[78]

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[77] *Id.*

[78] Judge Stack participated in virtually all of the settlement and fee discussions that took place from August 2017 until February 2018, and he has consulted with the Special Master in reviewing and evaluating fee requests. Judge Stack has reviewed this Report and

Mr. Seeger served ably as the chair of the PSNC, keeping discussions going even when they (frequently) seemed in danger of breaking down. It is the judgment of Special Master Reisman and Special Master Stack that without Mr. Seeger's involvement in the process, a resolution would not have been reached. Mr. Seeger and the Special Masters all recognized from the beginning the advantages of a class settlement vehicle; many of the claims were "negative value" claims that could not be litigated cost effectively, and thus a class settlement could be administered more simply, cheaply, fairly, and consistently than a combination of class and inventory settlements. A class settlement would also provide the complete resolution Syngenta sought. Mr. Gustafson generally agreed. Both Mr. Clark and Mr. Watts, who represented large groups of plaintiffs in individual lawsuits, strongly opposed a class-only resolution.

The unusual structure of this litigation – involving multiple class actions and mass actions pending in multiple federal and state court – presented unique challenges to achieving a settlement. The groups of plaintiffs and their counsel were, in general, allies against their common adversary, Syngenta. At the same time, however, they also were – at least to some extent – competitors. Their litigation strategies and their views as to how their recovery should be determined differed. Any settlement would have to bridge the gaps between plaintiffs and Syngenta and satisfy the various plaintiff factions. It would also have to be one that the courts overseeing the class action litigations could approve as fair, reasonable, and adequate under Fed. R. Civ. P. 23(e)(2) and analogous state rules.

These circumstances had important implications for plaintiffs' counsel negotiating the settlement. Achieving a settlement that would benefit their clients with a certain recovery in

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Recommendation and has informed the Special Master that he agrees with its recitation of the relevant events, conclusions, and recommendations.

what counsel agree – and the Court has found – was a risky case required a willingness to work constructively toward a compromise that would be broadly acceptable to the various plaintiff contingencies. An approach that disproportionately advantaged one firm's clients, or one group's clients, was bound to fail. If class action plaintiffs were not treated comparably to plaintiffs in other pending class actions, or to individual contingent fee plaintiffs, the courts before which the class actions were pending would have had difficulty finding the settlement fair, reasonable, and adequate. Conversely, if significant groups of individual contingent fee plaintiffs, or plaintiffs in certain class actions, could not support the settlement as fair and opted out, the settlement would fail because it would not provide Syngenta with the broad peace that was the consideration for the settlement. Thus, an insistence on extreme positions that could not be broadly accepted by the multiple plaintiff constituencies was antithetical to achieving a settlement that would benefit all plaintiffs with a certain – and substantial – recovery.

4. September 25, 2017 Term Sheet

The Minnesota class trial before Judge Miller began on September 11, 2017. Settlement negotiations continued daily up to the start of and during the trial. The Special Masters were aware (from communications with the parties at the time) that prior to the start of the trial, the parties were very close on a dollar amount for a settlement. The main disputed issue was how to structure a settlement so that independently represented farmers could be part of the settlement but not part of the class, while at the same time ensuring that a class settlement would meet judicial standards for approval as fair, reasonable, and adequate.[79] The Special Masters insisted that the guiding principle had to be that all farmers, regardless of whether they were represented

[79] *See* Fed. R. Civ. P. 23(e)(2).

or not, had to be treated the same in terms of recovery in any settlement. Syngenta continued to insist that any settlement had to cover all Producer plaintiffs.

On September 25, 2017, the members of the PSNC and Syngenta executed a term sheet providing for an overall settlement totaling $1.51 billion.[80] The term sheet, which expressly stated that it would be superseded by a full master settlement agreement[81], contemplated a parallel settlement structure, with class and individual settlements that would divide the total $1.51 billion settlement amount. It was the opinion of the Special Masters at the time, and remains so, that the reason for this proposed parallel – and unwieldy – structure was the allocation of attorneys' fees.

5. February 23, 2018 Settlement Agreement

Immediately after the signing of the term sheet, discussions began toward negotiation of a final, class-only settlement agreement and a fee-sharing agreement among the key plaintiffs' lawyer groups. Mr. Seeger expressed the view that a class settlement would be the most efficient and fair mechanism to assure that all claimants would be treated on an equal, consistent basis, regardless of how they had initially pursued their claim (*e.g.*, through a class action, through an individual action, or as an absent Class Member). Special Master Reisman, who had consistently believed that a single class settlement represented the fairest and most efficient resolution, concurred. As she explained to the Courts, and as none of the participants in the settlement negotiations disputed,

> . . . the fundamental principle, when we negotiated the settlement, was that a claimant, a farmer who might be part of the class, was going to be compensated in exactly the same way that a farmer who

[80] *See* Settlement Term Sheet, executed Sept. 25, 2017.

[81] *See id.* at ¶1(a).

> was part of, say, an inventory deal. And so whatever allocation process we put in place I think has to accomplish that goal. And so I think . . . it's competition to some extent among the groups who are representing different claimants, but I think fundamentally we have to do that process in a way that makes sure all the producer plaintiffs who are included in this settlement are treated the same way.[82]

Thus, negotiations continued from September 2017 to February 2018 on the terms of a settlement agreement for the $1.51 billion total amount, allocation of that amount among subclasses who were represented by subclass counsel, and a possible fee-sharing agreement. Special Masters Daniel Stack and Ellen Reisman, along with Andrew Karron and Dorian Hurley (of Reisman Karron Greene LLP), conducted and mediated these discussions, and two conferences with counsel for the parties and the Special Masters were held with Judges Lungstrum, Herndon, and Miller.

The plaintiffs' lawyers on the PSNC, joined by Mr. Stueve, sought to reach resolution on these issues. (Mr. Cracken participated in many of these discussions on behalf of Mr. Watts.) Again, Mr. Seeger took the lead, but others worked diligently to achieve a settlement. On the eve of the signing of the Settlement Agreement, Messrs. Seeger, Stueve, Gustafson, Clark, and Watts had agreed to the terms of the Settlement Agreement and also to a Fee-Sharing Agreement. Before signing, Mr. Watts withdrew from the Fee-Sharing Agreement.

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[82] *See* Hr'g Tr. of Settlement Status Conference held Dec. 19, 2017, at 10; *see also id.* at 5 ("The notion was that there would be a process for dividing – for allocating the total lump sum between those groups. And the guiding principle of the settlement was that class members, claimants, regardless of whether they were in the class settlement or in the inventory settlement, would be treated the same; in other words, the benefits available to them would be exactly the same."). Judge Lungstrum reiterated this point in the Preliminary Approval Order, that a unitary class structure "made the most sense to the negotiating parties because the final settlement quite reasonably gives the same recovery to all producers (whether or not they have filed individual suits)[.]" Memorandum and Order, ECF No. 3531 at 10.

Mr. Stueve and Mr. Seeger convinced their colleagues in the Kansas MDL Leadership to support the settlement and the Fee-Sharing Agreement, despite their lack of direct involvement in the negotiations. Mr. Gustafson likewise played a significant role in working with various constituencies in the Minnesota Leadership to gain their support for the settlement. It is also important to recognize the significant contribution of Mr. Clark in persuading his business partner Mr. Phipps to accept the fact and terms of a class settlement, which was contrary to Mr. Phipps's fundamental vision of how these sorts of claims should be litigated and resolved.

It is the opinion of Special Master Reisman and Special Master Stack that Syngenta would not have proceeded with a settlement that did not encompass **all** of the key plaintiffs' counsel factions and **all** of the litigation in the four key jurisdictions. Thus, the agreement of the Clark/Phipps group and Watts Guerra LLP – both of which had resisted a class resolution – was crucial to consummating this settlement. In this regard, it is noteworthy that virtually until the end of the negotiations, Mr. Watts's business partner Mr. Cracken persisted in advocating a two-tier class and inventory structure that would have been difficult, complex, and expensive to administer and would have resulted in delayed payments to Class Members.[83]

[83] One other plaintiffs' group played a significant and negative role with respect to settlement. Weller, Green, Toups & Terrell, LLP and The Coffman Law Firm ("Coffman/Toups") objected to preliminary approval of the settlement on several grounds, including that the courts should enforce the term sheet. *See* Memorandum and Order, ECF No. 3531 at 9. Judge Lungstrum overruled that objection and held that the term sheet is not an enforceable contract. *Id.* These firms have continued to engage in conduct that is contrary to the objective of a fair and efficient implementation of the settlement. This includes advocating for attorneys' fee compensation consistent with the term sheet. *See* Toups/Coffman Plaintiffs' Counsel's Motion for an Award of Attorneys' Fees and Expenses ("Coffman/Toups Fee Memo"), ECF No. 3567, 3567-1 (Toups Declaration In Support Of Fee Petition). at 6-7, filed July 10, 2018. The conduct also includes publishing on a website a version of the claim form pre-filled with information asserting that the Producer plaintiff had not planted Viptera and had no "fed on farm" bushels, which generated incorrect claim forms that would unfairly compensate their clients at the expense of other Class Members and required corrective action by the Claims

C. Class Response to Settlement Agreement

The settlement has been well received by Class Members.[84] Notice was sent to (1) more than 643,000 individuals registered with the Farm Services Administration ("FSA") as operators (in whole or in part) of corn-growing farms during the Class Period[85] or reflected as Producers on a list provided by Class Counsel, as well as (2) over 7,800 entities reflected as potential Grain Handling Facilities on FSA lists, commercially available lists, state agency records, and (3) 379 entities identified as potential Ethanol Production Facilities based on commercially available lists and additional internet research.[86] The multiple data sources meant that the notice list was, by design, potentially over-inclusive and likely to include some duplication so that it overstates the potential class size. The Claims Deadline was October 12, 2018.[87] As of November 12, 2018, potential Class Members submitted a total of 228,194 claim forms, representing over 35% of

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Administrator and Class Counsel. *See* Settlement Class Counsel's Memorandum of Law in Support of their Motion to Enjoin Toups/Coffman and for Other Relief, ECF No. 3747, filed Oct. 4, 2018.

[84] Data cited herein were obtained from the Notice and Claims Administrator, BrownGreer PLC. *See* Declaration of Orran L. Brown Sr. dated Oct. 17, 2018 ("Brown Decl."), ECF No. 3777-1, and Supplemental Declaration of William Atkinson in Support of Final Settlement Approval dated Nov. 12, 2018 ("Atkinson Decl."), ECF No. 3810-1, filed Nov. 14, 2018.

[85] Under the Settlement Agreement, Class Members are persons "that during the Class Period owned any interest in Corn in the United States priced for sale during the Class Period . . ." Settlement Agreement § 1.1. Thus, for farms with multiple owners, each fractional owner is a separate Class Member who may assert a claim in respect to his or her interest.

[86] Brown Decl. at ¶¶ 15-18.

[87] Settlement Agreement § 2.10; Preliminary Approval Order, ECF No. 3532 at 10, entered Apr. 4, 2018; Syngenta Corn Seed Settlement Long Form Notice, Motion for Preliminary Approval of Settlement, ECF No. 3507-5 at 1, filed Mar. 12, 2018.

direct notices sent.[88] It is estimated that Producer Class Members whose interests represent over 48 million acres have filed claims.[89]

The claims submitted as of November 12, 2018 were as follows:

- 180,245 claims submitted by Subclass 1 Members (Producers who did not purchase Viptera and/or Duracade);[90]
- 37,523 claims submitted by Subclass 2 Members (Producers who did purchase Viptera and/or Duracade);[91]
- 1,865 claims submitted by Subclass 3 Members (Grain Handling Facilities not excluded from the Settlement Agreement)[92]; and
- 350 claims submitted by Subclass 4 Members (Ethanol Production Facilities).[93]

In addition, as of November 12, 2018, 8,211 hard copy claim forms were in the process of review and had yet to be identified within a subclass.[94]

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[88] Atkinson Decl. at ¶ 5. Direct notice was intentionally over inclusive and also includes known duplicates, so the actual response percentage is likely higher than 35%. *See* Brown Decl. at ¶ 18, Table 1 (For example, the Parties estimate that there are approximately 4,500 unique Grain Handling Facilities in the United States. The 7,800 "entities" referenced here are *potential* Grain Handling Facilities with unique name and address combinations who were mailed the Class Notice.).

[89] *Id*. at ¶ 6.

[90] *Id*. at ¶ 5, Table 1.

[91] *Id*.

[92] *Id*. This does not include Excluded Exporters (ADM; Bunge; Cargill; Louis Dreyfus; Gavilon; Trans Coastal Supply Company; Agribase International, Inc.; the DeLong Company, Inc.; and their respective subsidiaries and affiliates) who are excluded from the Settlement. Settlement Agreement § 2.22.

[93] Atkinson Decl. at ¶ 5, Table 1.

[94] *Id*. at ¶ 5, n.1.

More than 52% of claimants submitted their claims *pro se* – which is compelling evidence that farmers find the claims process easy and the settlement terms fair.[95] Moreover, only a miniscule number of potential Class Members opted out. As of November 9, 2018, the Claims Administrator had received only 65 Opt-Out requests, and more than a third of those (25) were ultimately revoked.[96] Of the remaining 40 Opt-Out requests, only 17 complied with the Opt-Out requirements, and five Opt-Outs actually filed claim forms after they opted out.[97]

In short, the level of participation in a settlement of this magnitude exceeds expectations, especially compared to what is often seen in class action settlements.[98] This enthusiastic response provides strong evidence of the success of the litigation pursued by plaintiffs' counsel and of the significant benefits provided by a hard-negotiated Settlement Agreement.

D. Fee Submissions by Plaintiffs' Counsel

As discussed above, the complexity and nature of this litigation resulted in some unique provisions in the Settlement Agreement regarding award and allocation of fees. The Settlement Agreement provides that "Settlement Class Counsel and other counsel representing Class Members . . . shall make Fee and Expense Applications to" the Kansas federal court, the Illinois federal court, or the Minnesota state court.[99] It further provides that "[a]ny Fee and Expense

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[95] *Id*. at ¶ 5 and Atkinson Decl. Ex. 2, Chart 1.

[96] *Id*. at ¶¶ 14, 15 and Atkinson Decl. Ex. 4, Chart 1.

[97] *Id*.

[98] *See* Rubenstein, 4 Newberg on Class Actions § 12:17 (5th ed.) (Noting generally low claim rates in class actions, paucity of reliable data, minority of cases with large classes and claiming rates above 20%); *see also* B. Fitzpatrick & R. Gilbert, "An Empirical Look at Compensation in Consumer Class Actions," 11 N.Y.U. J. L. & Bus. at 767, 772-79 (2015).

[99] *Id.* § 7.2.1.

Award in conjunction with this Settlement shall be issued by the [Kansas federal court], in consultation with and approved by the Honorable David R. Herndon of the [Illinois federal court] and the Honorable Laurie J. Miller of the [Minnesota state court] (or if they are unavailable, another judge from their respective courts), in a written order by the Court and shall be paid from the Settlement Fund."[100] Disputes arising from the Fee and Expense Award are subject to the jurisdiction of the Kansas federal court, except in two respects: (1) "Matters arising from client fee contracts and referring counsel referral agreements involving . . . Clark, Love & Hutson shall be subject to the jurisdiction of" the Illinois federal court;[101] and (2) "Matters arising from client fee contracts and referring counsel referral agreements involving Class Members with claims pending at any time in *In re Syngenta Class Action Litigation*, Court File No. 27-CV-15-12625, in the Fourth Judicial District Court, County of Hennepin, State of Minnesota (the 'Minnesota Plaintiffs'), shall be subject to the jurisdiction of the Honorable Laurie J. Miller of the Fourth Judicial District Court, County of Hennepin, State of Minnesota (or if she is unavailable, another judge from her respective court)."[102]

1. Submissions

Plaintiffs' counsel submitted fee and expense petitions across multiple jurisdictions in a wide variety of formats. As discussed above, the Settlement Agreement contemplates that counsel would file these petitions with Judges Lungstrum, Herndon, and/or Miller, and that all

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[100] *Id.* § 7.2.2.

[101] *Id.* § 7.2.3.1.

[102] *Id.* § 7.2.3.2.

three judges would participate in the fee award determination and allocation process.[103] Pursuant to Judge Lungstrum's preliminary approval order, counsel initially submitted their motions and fee petitions by July 10, 2018.[104] Responsive and reply briefs were submitted by August 17 and September 17, 2018, respectively.[105] On July 18, 2018, Judge Lungstrum issued an additional order requiring the "completion and submission of Excel spreadsheets so that certain basic fee and expense information [could] be presented to the Court and Special Masters in standardized summary format that will facilitate review and evaluation of hours and expense data."[106] A second round of submissions followed, including both spreadsheets that summarized previously submitted data, and spreadsheets that provided new data according to the Court's required format. Ultimately, plaintiffs' counsel submitted motions, petitions, and/or spreadsheets by or on

[103] Settlement Agreement §§ 7.2.1-7.2.2.

[104] Paragraph 17 of Kansas federal court's preliminary approval order required that all attorneys seeking attorneys' fees from the settlement fund file a motion or petition by July 10, 2018:

> Settlement Class Counsel shall make any motion or petition for awards of attorneys' fees and expenses and for service/case contribution/incentive awards, including any supporting memoranda and materials, no later than thirty (30) days before the deadline for a Class Member to file an objection to the settlement by the Fee and Expense Application Deadline set forth below. Any response or objection to that motion, including any supporting memoranda or materials, shall be filed on or before the Objection Response Deadline set forth below. *Any other person seeking attorneys' fees, expenses, or service/case contribution/incentive awards from the Settlement Fund must file a motion, including any supporting memoranda and materials, by the Fee and Expense Application Deadline.* Any response to such a motion shall be filed on or before the Objection Response Deadline as set forth below.

ECF No. 3532 at 7-8 (emphasis added); *see also* Order Regarding Attorneys Fee Submissions, ECF No. 3613, filed July 18, 2018.

[105] Order Regarding Attorneys Fee Submissions, ECF No. 3613.

[106] *Id.* at 2.

behalf of several hundred law firms to all three jurisdictions. The Special Master has reviewed these petitions and spreadsheets to identify potential overlapping or duplicated data.

While most named law firms were affiliated with a single lead counsel group, a significant number were affiliated with more than one group or were claimed as affiliates of more than one group. Many firms submitted data on behalf of both themselves and these affiliated firms. Overlap in these fee submissions spanned both jurisdiction and group affiliation. In some cases, data were submitted for the same firm in both that firm's petition/spreadsheet, and in the petition of a lead counsel group. Some of these multiple affiliations included lead counsel groups in multiple jurisdictions. Likewise, counsel groups often disputed the affiliation of different firms, causing further potential duplication. Not all overlap represented duplication, however. For example, some firms performed common benefit work with one group or in one jurisdiction but also performed individual client work with another group or in another jurisdiction. Similarly, some submissions listed or claimed a law firm by name but included no data for the firm, while others included the required spreadsheet, so that only one set of hard data exists for the firm. As discussed below, the quality and volume of the data submitted makes the task of categorizing law firms into jurisdictions and counsel groupings challenging.

2. Positions on Fee Awards and Distribution

The voluminous submissions by various law firms reflect differing positions with respect to allocation of attorneys' fees. Moreover, it is fair to say that, over the course of briefing, some firms' positions evolved to take account of other firms' submissions. The Special Master respectfully refers the Courts to those submissions for their full contents. In general, however, the principal positions may be summarized as follows.

The Kansas MDL Leadership, Minnesota Co-Lead Counsel (Gustafson Gluek PLLC), and the Clark/Phipps group all argue for an allocation of the total fees awarded by the Kansas federal court that is generally consistent with the Fee-Sharing Agreement. As discussed above, the Fee-Sharing Agreement provides that, of the total fee awarded by the Kansas federal court, the Kansas Common Benefit Group should receive 50%, Mr. Gustafson and other Minnesota class action lawyers should receive 12.5%, the Clark/Phipps group should receive 17.5%, and (following Mr. Watts's withdrawal from the agreement) the remaining 20% is left open for future allocation. All three contingents that are parties to the Fee-Sharing Agreement now argue that the remaining 20% should be re-allocated and that under the *Johnson* factors they each deserve a portion of that 20%, in addition to the other fee allocations they request.

- The Kansas MDL Leadership has requested that 50% of the total fee awarded by the Kansas federal court go to the Kansas Common Benefit Group, along with re-allocation under the *Johnson* factors of the 20% of the total fee award not allocated by the Fee-Sharing Agreement. Of the amount awarded to the Kansas Common Benefit Group, no less than 10% would go to Seeger Weiss LLP, which also would receive the same multiplier on its lodestar, if any, as Co-Lead Counsel, consistent with the terms of an agreement reached between those groups.
- Minnesota Co-Lead Counsel (Gustafson Gluek PLLC) has requested 12.5% of the total fee awarded by the Kansas federal court go to Minnesota Class Counsel if the Court and Special Master find that the Fee-Sharing Agreement is fair and reasonable, plus expenses.
- The Clark/Phipps group has requested 17.5% of the total fee awarded by the Kansas federal court for its creation of pressure in Illinois as a third litigation

front, its efforts developing legal theories and experts, and its role in achieving the settlement. Clark/Phipps also request that the Special Master determine the allocation of the 20% of the total fee award not allocated by the Fee-Sharing Agreement.

While offering different proposals than the groups above, both Watts Guerra LLP and Bassford Remele, P.A. propose that all claims be submitted prior to calculating the exact allocation of fees, and that the JPA and contingent fee agreements should be enforced:

- Watts Guerra LLP has requested that all law firms who represent individual clients receive an award calculated as 33.33% of their clients' actual recovery (a reduction of Watts Guerra LLP's contingent fee agreement rate of 40%). They then propose that a common benefit assessment on that recovery be used to compensate Class Counsel. They propose that the 11% assessment Watts Guerra LLP agreed to in the JPA should be proportionally reduced to 9.17% to take account of Watts Guerra LLP's voluntary cap on their contingent fees. They also propose that, for other contingent fee firms that did not perform common benefit work or enter a JPA, the Court impose a higher common benefit assessment. Class Counsel would be entitled to take a 33.33% award on the recovery of all unrepresented claimants, as well as receiving amounts paid by attorneys into the common benefit fund pursuant to the JPA. The result would be that Watts Guerra LLP would receive 24.16% of the total recovery of its clients who participate in the settlement.

- Bassford Remele, P.A. calls for the submission of all claims prior to the allocation of fees from the Attorneys' Fee Award. It proposes that the Court apply the

following framework, which it characterizes as consistent with the JPA and the approach used in the *NFL*[107] concussion litigation: First, the Court should determine a reasonable common benefit fee using the "percentage of the fund" method with a lodestar cross-check and multipliers, in order to adjust and allocate that fee consistently among the common benefit groups in each jurisdiction. Second, the Court should apply that common benefit fee as an offset to the overall Attorneys' Fee Award to determine a reasonable contingency fee to be awarded to IRPAs. Third, that contingency fee should be awarded based on actual recoveries in a manner that treats all IRPAs consistently across jurisdictions. And fourth, allocation of the Minnesota common benefit fee should be accomplished by having Minnesota Co-Lead Counsel and Co-Lead Class Counsel prepare a recommended allocation for submission to the Minnesota state court, which would have ultimate allocation authority.

- Coffman/Toups object to any determination of attorneys' fees prior to a determination of claims under the settlement and further opportunity to analyze the fee submissions. They object to being required to account for time other than common benefit time spent working on behalf of their bellwether plaintiff clients. They object to common benefit fees of more than 16% of the Gross Settlement Proceeds and believe that the remainder of the Attorneys' Fee Award should compensate contingent fee counsel consistent with enforcement of their individual contingent fee agreements. The firm estimates that its approximately 9,400

[107] *In re National Football League Players' Concussion Injury Litigation*, ("*NFL*") MDL No. 2323, 2018 WL 1635648 (E.D. Penn. Apr. 5, 2018) *appeals pending*, No. 18-202 (3d Cir. Filed May 3, 2018).

clients have 2.9 million acres of corn, the value of which is at least 10% of the value of all claims filed, and requests 10% of the total fee award, or alternatively at least $31 million. While they seek enforcement of contingent fee agreements, Coffman/Toups is willing to accept capping of contingent fee awards.

- Heninger Garrison Davis, LLC, using the common fund doctrine, seeks 3% of any total common benefit fund fee award plus expenses. Heninger Garrison Davis, LLC also provides calculations using the lodestar method to show the reasonableness of its request using its fees plus a multiplier of three and expenses.

Numerous other firms also filed petitions seeking fees in the Kansas federal court, the Minnesota state court, and/or the Illinois federal court. Some sought common benefit fees; others appear only to be seeking enforcement of contingent fee contracts; still others make no specific fee request. All told, submissions were made by or on behalf of several hundred law firms as part of this process.[108] These submissions have also been reviewed and considered in making the Recommendations herein.

III. AUTHORITY TO AWARD COMMON BENEFIT ATTORNEYS' FEES AMONG COUNSEL AND TO SET UP AN "IRPA" FUND

Although this case settled as a nationwide class action, it is fairly viewed as a "hybrid" because the claims resolved under it include both class actions and individual actions filed in multiple federal and state courts by individual plaintiffs who retained their own counsel.

It follows from this hybrid character that the Courts' authority to award fees and expenses derives from several sources. Federal Rule of Civil Procedure 23(h) provides that "[i]n a

[108] *See* Law Firm Assignments by Special Master (Exhibit 2 hereto).

certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." More generally, the authority of courts to award reasonable attorneys' fees and expenses pursuant to the common fund doctrine and the related common benefit doctrine has long been recognized.[109] Consistent with these legal and equitable principles, the comments to Rule 23(h) make clear that Rule 23(h):

> provides a format for all awards of attorney fees and nontaxable costs in connection with a class action, not only the award to class counsel. In some situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class . . ..[110]

Here, the Settlement Agreement recognizes that the successful result in this case was obtained through the work of multiple counsel in multiple jurisdictions who collectively applied litigation pressure in multiple forums that ultimately persuaded Syngenta to resolve the various litigations through a nationwide class action settlement.[111] Thus, it expressly provides that "Settlement Class Counsel and other counsel representing Class Members who performed work

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[109] *See Trustees v. Greenough*, 105 U.S. 527 (1881), and its progeny, including *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885), *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939), *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); *see also* Manual for Complex Litigation, §§ 14.215, 20.312 (4th ed. 2004) ("MDL judges generally issue orders directing that defendants who settle MDL-related cases contribute a fixed percentage of the settlement to a general fund to pay national counsel."); *In re Diet Drugs*, 582 F.3d 524, 546-47 (3d Cir. 2009); *In re Air Crash Disaster at Fla. Everglades*, 549 F.2d 1006, 1008 (5th Cir. 1977); Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371, 378 (2014) (the common benefit doctrine is justified "on principles of equity or quantum meruit or class action procedures or [a court's] inherent authority").

[110] Fed. R. Civ. P. 23(h), comment on 2003 amendments. *See also Gottlieb v. Barry*, 43 F.3d at 489 (appropriate to award fees to non-lead counsel who "have indeed conferred a benefit on the class" through 16 months of vigorous litigation).

[111] *See* Settlement Agreement at 1-3 & Ex. 1, ECF No. 3507.

for the benefit of Class Members shall make Fee and Expense Applications . . . ."[112] PSNC members executing the agreement included counsel representing plaintiffs in all three relevant jurisdictions and counsel pursuing class actions and mass action individual representations.

In the Tenth Circuit, as in the majority of circuits, courts determine fair and reasonable attorneys' fees as a percentage of the fund, taking into account all of the circumstances of the litigation, and subject to a cross-check that compares the fee award to the total hours recorded times the requested hourly rate.[113] Under both the percentage and cross-check approach, reasonableness is determined by consideration of the now well-known factors originally articulated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), and approved in the Tenth Circuit:

> (1) the time and labor involved; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) any prearranged fee-this is helpful but not determinative; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature

[112] *Id.*, § 7.2.1.

[113] *See In re: Urethane Antitrust Litig.*, No. 04-1616-JWL, 2016 WL 4060156, at *4 (D. Kan. July 29, 2016*) (citing Rosenbaum v. MacAllister*, 64 F.3d 1439, 1445 (10th Cir. 1995))*; Gottlieb*, 43 F.3d at 483; *see also Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) "under the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class."); Manual for Complex Litigation § 14.121 ("[T]he vast majority of courts . . . use the percentage-fee method in common-fund cases."); *Report of Third Circuit Task Force: Selection of Class Counsel*, 208 F.R.D. 340, 355 (2002) ("A percentage fee, tailored to the realities of the particular case, remains superior to any other means of determining a reasonable fee for class counsel…").

> and length of the professional relationship with the client; and (12) awards in similar cases.[114]

As Judge Lungstrum recognized at the November 15, 2018 hearing, a one-third attorneys' fee award is easily justified under the *Johnson* factors. As the Courts before which the cases were litigated are well aware, the Syngenta corn litigation was extremely complex, hard-fought, and time-consuming, and it involved novel legal theories and substantial risk. And, particularly in light of that risk, the ultimate recovery is extraordinary: at $1.51 billion, this is the largest GMO agricultural settlement in U.S. history[115], and the recovery represents approximately 19% of plaintiffs' claimed damages.[116] Several points concerning this unique litigation and settlement bear on both the appropriateness of a one-third fee award as well as allocation considerations:

1. The lead plaintiffs' counsel in each of the jurisdictions were experienced in complex, mass tort litigation, including in agricultural cases, such as the *In re Genetically Modified Rice Litigation*. Their briefs detail the extensive work performed on this case to the exclusion of other work.

2. The cases in all jurisdictions were aggressively defended by first-tier defense counsel from Kirkland & Ellis LLP and other firms.

3. In contrast to many class actions that follow on and build on governmental enforcement proceedings – *e.g.*, the *Volkswagen* diesel emissions case, the *Deepwater Horizon* BP oil spill case, or securities fraud or antitrust cases – the Syngenta corn cases did not involve any parallel government proceedings on which plaintiffs' counsel could "piggyback" their efforts. The absence of government involvement

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[114] *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454-55 (10th Cir. 1980) (quoting *Johnson*, 488 F.2d at 717-19); *see also Gottlieb*, 43 F.3d at 482 (*Johnson* factors "for statutory fee cases apply equally to percentage fee awards in common fund cases.").

[115] *See* Plaintiffs' Memorandum of Law in Support of Their Motion for Preliminary Approval of Settlement, ECF No. 3507, at 2; Plaintiffs' Memorandum of Law in Support of Their Motion for Final Approval of Settlement, ECF No. 3777, at 2, filed Oct. 17, 2018.

[116] During settlement negotiations, plaintiffs alleged at least $8.0 billion in compensatory damages.

also arguably increased the risk of non-recovery.

4. Lead plaintiffs' counsel in various jurisdictions generally coordinated their litigation efforts to pursue a common strategy and avoid needless duplication. These included establishing leadership structures and obtaining common benefit orders from the relevant courts.

5. Even with these efforts at efficiency, the cases involved an enormous amount of work, including:

    a. Factual investigation and legal theory development;

    b. Successful defense of complex dispositive motion practice on jurisdictional grounds, as well as on the issues of duty and the economic loss doctrine;

    c. Extensive discovery conducted in a compressed time period, including depositions on four continents;

    d. Development of numerous plaintiffs' experts whose testimony was admitted at trial, and discovery and briefing related to numerous defense experts;

    e. Successful litigation of motions for class certification in the Kansas MDL and in Minnesota;

    f. One complete class action trial (Kansas class action) resulting in a $217.7 million verdict; preparation of the individual *Mensik* trial that resulted in a mistrial; and a partial trial of the Minnesota class action;

    g. Preparation for additional trials to be conducted in the various venues thereafter; and

    h. Extensive and hard-fought settlement negotiations, particularly by members of the PSNC.

6. The case involved a novel claim arising from the marketing of GMO seed that had obtained full regulatory approval in the United States and as to which no health risk or injury was asserted.

7. The duty and economic loss doctrine issues were novel as applied to the facts at issue, and the court decisions obtained were, therefore, unprecedented. Moreover, those issues, as well as other issues related to causation and damages, would have been subject to review on appeal.

8. The cases also presented difficult issues of causation and damages, requiring litigation of a novel theory of a "break" in the market.

In light of all of the risks to ultimate plaintiffs' success, the result is extraordinary. Class members have indicated support for the settlement with an exceptionally high participation rate and a miniscule number of opt-outs. Even with an award of a one-third attorneys' fee, participating Class Members can expect significant recoveries.

How to allocate the Attorneys' Fee Award among plaintiffs' counsel is less straightforward. The sprawling Syngenta litigation does not precisely correspond to any other hybrid class and individual action in which attorneys' fees have been awarded and allocated. It involved thousands of cases in multiple federal and state forums, including class actions and individual actions.

After carefully considering other courts' attorneys' fees allocation decisions in hybrid class action settlements, the Special Master recommends that an approach derived from that used in *Gottlieb* and in the *NFL* settlement is the most appropriate way to allocate fees fairly among the various counsel.[117] Under this approach, the majority of the total Attorneys' Fee Award would be allocated among groups of attorneys in the three main jurisdictions who performed work that benefited the entire Class by litigating on multiple fronts and successfully negotiating the settlement fund. A remaining portion of the Attorneys' Fee Award would be placed in a fund to be allocated among IRPAs. That pool would be allocated proportionally among IRPAs based on their clients' ultimate recoveries under the settlement, with a cap of no more than a 10% fee

[117] *See Gottlieb*, 43 F.3d at 489 (including class action fee awards both to Class Counsel and to certain individual counsel); *NFL*, MDL No. 2323, 2018 WL 1635648 (E.D. Pa. Apr. 5, 2018), *appeals pending*, No. 18-202 *et al*. (3d Cir. Filed May 3, 2018).

on a particular client's recovery. The effect of this approach would be to cap contingent fee recoveries for such work at a fixed percentage applicable to all such fees. Any money in this IRPA pool that is not needed to compensate IRPAs would then be distributed proportionally to the attorneys who had been awarded common benefit fees based on their contribution to the litigation and settlement efforts.

As set forth above, some plaintiffs' attorney groups have disputed the Courts' authority to allocate attorneys' fees in any manner other than as set forth in the JPAs, individual contingent fee agreements, and/or the common benefit hours and fee calculations provided by Kansas MDL Leadership and Minnesota counsel. The Special Master believes that none of these positions should prevail.

A. Authority to Modify Contingent Fee Agreements and Cap Attorneys' Fees to Counsel Representing Individual Class Members

Several firms representing individual Class Members argue in their fee applications and supplemental filings that they are entitled to attorneys' fees calculated from their clients' actual recovery using the contingent fee percentages set forth in their individual clients' agreements (or reduced percentages that the attorneys agree to), without regard to common-fund principles.[118]

[118] *See, e.g.*, Watts Guerra Memo, ECF No. 3611, at 37, 39 (contending that contingent fee agreements "establish its entitlement to the proportion of the Court's overall fee award" and arguing that the Court should award fees based on what attorneys "would have" a "clear right to" if their private fee contracts were enforced); Coffman/Toups Memo, ECF No. 3567, at 6 (concluding without citation to authority that they are "entitled to attorneys' fees calculated using the contingent fee percentages set forth in each of their client's contracts."); Shields Law Group, LLC's motion/application for attorney fees and expenses, memorandum in support, and corresponding declaration of attorney Spencer C. Shields and James T. Yoakum ("Shields Law Group Memo"), ECF No. 3584, at 2-3, filed July 10, 2018 (seeking attorneys' fees based on Rule 23(h), but not citing a legal basis for the award of such fees based on the existence of private fee agreements); Memorandum in Support of Eiland Law Firm's motion for award of attorneys' fees and reimbursement of expenses ("Eiland Law Firm Memo"), ECF No. 3593, at 8-9, filed July 10, 2018 (requesting that "its fee agreements be enforced and it receive the actual amount of contingency fees that it would have been entitled to"); *see also* Toups/Coffman Plaintiffs'

Whether the Courts may modify, void, or preclude enforcement of contingent fee agreements between some Class Members and their counsel implicates issues of both personal and subject-matter jurisdiction, and of federalism. There is significant legal support for the proposition that the Courts have the required personal and subject-matter jurisdiction and the legal and equitable authority to modify contingent fee agreements.

1. Personal and Subject-Matter Jurisdiction Required to Modify Contingent Fee Agreements

Having preliminarily certified a nationwide class and preliminarily approved a settlement in this MDL, the Kansas federal court has personal jurisdiction over Class Members and their counsel.[119] Minimum contacts with Kansas sufficient to establish personal jurisdiction exist where, as here, a Class Member has received adequate notice of the action and has been afforded an opportunity – but has declined – to opt-out of the lawsuit.[120] Final settlement approval cements that jurisdiction.[121]

As to subject matter jurisdiction, pursuant to the Settlement Agreement, the Kansas federal court has continuing jurisdiction over the settlement and the *res* created by it – the Gross Settlement Proceeds of $1.51 billion.[122] The All Writs Act, 28 U.S.C. § 1651, grants the Kansas federal court expansive authority to issue "all writs necessary or appropriate in aid of " its

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Counsel's Reply in Re: Their Motion for an Award of Attorney's Fees and Expenses ("Coffman/Toups Reply") ECF. No. 3720, at 10, filed Sept 17, 2018.

[119] *See In re Diet Drugs*, 282 F.3d 220, 230-31 (3d Cir. 2002).

[120] *Id.* (*citing Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985)).

[121] *See id.* at 229, 236-37.

[122] *See* Settlement Agreement §§ 2.18, 7, 9.18.

jurisdiction.[123] And the Kansas federal court's jurisdiction over the Attorneys' Fee Award from the Gross Settlement Proceeds, as to which competing claims are being asserted by competing groups of lawyers and Class Members whose recovery may be affected by attorneys' fees, appears sufficient to satisfy even the narrower standard that the Kansas federal court's authority to act in aid of its jurisdiction applies only to *in rem* or *quasi in rem* proceedings.[124]

2. Authority to Modify Contingent Fee Agreements

Courts have the legal and equitable authority to determine the reasonableness of and modify contingent fee agreements of attorneys that appear before them because the courts have a duty to meet the obligations imposed on them by Rule 23, supervise attorneys that appear before them, protect the interests of class members, and preserve the integrity of the legal process.[125] In

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[123] *Diet Drugs*, 282 F.3d at 233.

[124] *See Tooele County v. United States*, 820 F.3d 1183, 1186, 1189 (10th Cir. 2016) (Noting many circuit courts' expansive reading of the All Writs Act, but holding more narrowly that the All Writs Act exception to the Anti-Injunction Act, which permits a federal court to issue an injunction against a state court action "in aid of" the federal court's jurisdiction applies only to *in rem* or *quasi in rem* proceedings).

[125] *See, e.g.*, *In re Goldstein*, 430 F.3d 106, 110 (2d Cir. 2005) ("A federal court possesses certain inherent powers to discipline attorneys who appear before it. These include[] the powers to police the conduct of attorneys as officers of the court and to impose sanctions for attorney misconduct. In exercising these inherent powers, courts have the right to inquire into fee arrangements . . . to protect the client from excessive fees.") (quotation marks and internal citations omitted); *In re Finney*, 130 F. App'x 527, 531 n.5 (3d Cir. 2005) (citing *Dunn v. H.K. Porter Co.*, 602 F.2d 1105, 1110 n.8 (3d Cir. 1970) ("the examination of a contingent fee arrangement's reasonableness . . . implicates our responsibility to supervise the members of our Bar" and thus the Court "must apply federal law"); *Karim v. Finch Shipping Co.*, 233 F. Supp. 2d 807, 810 (E.D. La. 2002), *aff'd*, 374 F.3d 302 (5th Cir. 2004) ("Among the broad equitable powers of a federal court is its supervisory capacity over an attorney's contingent fee agreements."); *In re A.H. Robins Co., Inc.*, 86 F.3d 364, 373 (4th Cir. 1996) ("[T]he law of this circuit has long been clear that federal district courts have inherent power and an obligation to limit attorneys' fees to a reasonable amount. . . . In the present case, the district court, acting upon its extensive knowledge of this litigation . . . simply applied the settled principle that

complex mass litigation, "excessive fees can create a sense of overcompensation and reflect poorly on the court and its bar," negatively impacting "[p]ublic understanding of the fairness of the judicial process . . .."[126] Thus, courts have held that, in the context of contingent fee arrangements, implementing a reasonable cap on attorneys' fees "safeguard[s] the public's perception of the courts and legitimacy of the legal system's handling of massive MDLs and class actions"[127] and "promotes justice for all parties by allowing claimants to benefit (as their attorneys have) from the economies of scale and increased efficiency that an MDL provides."[128] Moreover, in a class action, a court's inherent authority to assess the reasonableness of contingent fee agreements is underscored because of the court's performance of its fiduciary duty to protect class members' interests by approving class counsel, ensuring the terms of the settlement protect the interests of class members, and approving attorneys' fees.[129] Accordingly,

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attorneys' fees must be reasonable. The court had this clear authority."); *Mitzel v. Westinghouse Elec. Corp*., 72 F.3d 414, 417 (3d Cir. 1995) ("[C]ontingency fee agreements in diversity cases are to be treated as matters of procedure governed by federal law."); *In re Michaelson*, 511 F.2d 882, 888 (9th Cir. 1975) ("The courts have the right to inquire into fee arrangements both to protect the client from excessive fees and . . . against suspected conflicts of interest."); *Schlesinger v. Teitelbaum*, 475 F.2d 137, 141 (3d Cir. 1973) (concluding that "in its supervisory power over the members of its bar, a court has jurisdiction of certain activities of such members, including the charges of contingent fees"); *Dunn*, 602 F.2d at 1110 & n.8 (concluding in class action case that district court had "authority to look beyond the face of the contingent fee agreements and set them aside for want of a proper factual showing" and holding that the district court should apply federal law because "its action is part and parcel of the process a federal court follows both in supervising members of its bar and in meeting the obligations imposed on it by [Rule 23]") (citations omitted).

[126] *In re Zyprexa Prod. Liab. Litig.*, 424 F. Supp. 2d 488, 493-94 (E.D.N.Y. 2006).

[127] *NFL*, 2018 WL 1658808 at *2.

[128] *In re Vioxx Prods. Liab. Litig*., 650 F. Supp. 2d 549, 558 (E.D. La. 2009).

[129] *See, e.g.*, *Evans v. TIN, Inc.*, No. CIV.A. 11-2182, 2013 WL 4501061, at *11–14 (E.D. La. Aug. 21, 2013) (agreeing with special master's analysis "regarding the Court's authority to limit

in both class actions and non-class MDLs, federal district courts have routinely capped attorneys' fees, relying on their inherent authority over proceedings before them and their equitable authority.[130]

This is a nationwide class action settlement in the Kansas federal court arising under federal law (the Lanham Act). Accordingly, the applicable law is federal law governing the court's inherent authority and duty to protect litigants appearing before it, including Class Members.[131] The Kansas federal court has adopted the Kansas Rules of Professional Conduct ("KRPC"), which apply to all proceedings before it.[132] KRPC Rule 1.5(a) requires that "[a] lawyer's fee shall be reasonable." Relevant factors to be considered in determining reasonableness include, among others "(1) the time and labor required"; "(2) the likelihood, if

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the fees of privately retained attorneys" given the court's "obligation to protect the interests of the class in its role as a fiduciary and to ensure the reasonableness of attorney's fees"); *In re Joint E. & S. Dists. Asbestos Litig.*, 878 F. Supp. 473, 558 (E.D.N.Y. & S.D.N.Y. 1995) ("Courts have wide discretion to approve, reject or limit fees earned by attorneys in prosecuting a class action. . . . The courts' fee-setting authority in a class action context, where a victory by the class typically creates a benefit that goes beyond those few individuals who actually prosecuted the class action, stems from the courts' equitable powers and the powers of the chancellor. . . . Courts reviewing fees pursuant to Rule 23, general equitable powers, or authority to control officers of the court, may override private, contractual fee agreements made by the attorneys representing the parties in the class action or related individual actions.").

[130] *See, e.g.*, *In re World Trade Center Disaster Site Litig.*, 754 F.3d 114, 126 (2d Cir. 2014); *In re: Oil Spill by Oil Rig "Deepwater Horizon" in Gulf of Mexico, on Apr. 20, 2010*, MDL No. 2179, ECF No. 6684 at 2 (E.D. La. June 15, 2012) (order setting caps on individual attorneys' fees in connection with class action settlement). *See generally* Report of Special Master Prof. William Rubenstein in *NFL* at 24-25 (citing cases regarding courts' inherent authority to protect litigants and the integrity of the legal process). Professor Rubenstein's initial and rebuttal reports to Judge Brody in the *NFL* case provide a thoughtful analysis of federal courts' authority to cap or modify contingent fee arrangements in connection with hybrid class action settlements.

[131] *See* Rubenstein *NFL* Report at 24-25 (citing cases regarding courts' inherent authority to protect litigants and the integrity of the legal process).

[132] *See* Kansas L.R. 83.6.1(a) (adopts Kansas Rules of Professional Conduct).

apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer"; "(4) the amount involved and the results obtained"; "(6) the nature and length of the professional relationship with the client"; and "(8) whether the fee is fixed or contingent."[133] The Rules specifically contemplate that courts may enforce KRPC Rule 1.5 and modify a fee upon "a court determination that a fee is not reasonable."[134]

A number of recent cases, including the *NFL* case in the Eastern District of Pennsylvania, the *Vioxx* case in the Eastern District of Louisiana, and the *Volkswagen* case in the Northern District of California, provide guidance on how courts, exercising their inherent authority in the context of a mass action or class action settlement, can evaluate and modify contingent fee agreements of IRPAs in conjunction with awarding common benefit fees.[135]

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[133] KRPC 1.5(a). Other relevant factors include: the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; the fee customarily charged in the locality for similar legal services; the time limitations imposed by the client or by the circumstances; and the experience, reputation, and ability of the lawyer or lawyers performing the services. *Id.*

[134] The Illinois federal court and the Minnesota state court, which have jurisdiction over attorneys and their clients who litigated in those forums, and who are tasked by the Settlement Agreement with addressing certain fee disputes, *see* Settlement Agreement §§ 7.2.2, 7.2.3, 9.18.2, also have similar inherent judicial authority to evaluate the reasonableness of attorneys' fees. The applicable rules of professional conduct in those jurisdictions are consistent with the Kansas Rule 1.5, which is modeled on American Bar Association Model Rule of Professional Conduct 1.5. *See* ABA Model Rule 1.5; Illinois Rules of Professional Conduct, Rule 1.5(a); U.S. District Court for the Southern District of Illinois Attorney Admission Questionnaire at 2, question 11.e (requiring applicant to state whether he or she is familiar with the ABA Model Rules); Minnesota Rules of Professional Conduct Rule 1.5(a).

[135] *See, e.g.*, *NFL*, 2018 WL 1635648; *In re Vioxx Prod. Liab. Litig.*, MDL No. 1657, 760 F. Supp. 2d 640 (E.D. La. 2010); *In re Volkswagen "Clean Diesel" Mktg., Sales Practices & Prod. Liab. Litig. ("Volkswagen")*, MDL No. 2672, 2017 WL 3175924 (N.D. Cal. July 21, 2017).

In *NFL*, the court exercised its legal and equitable authority to determine the reasonableness of and adjust contingent fee agreements and cap contingent fees. The court awarded class counsel and other qualifying common-benefit firms their requested attorneys' fees and expenses equating to approximately "11% of the value of the Settlement Agreement," which was paid by the defendant separately from class members' recoveries.[136] Then in a separate order the court presumptively limited the collection of contract fees for IRPAs to 22% of an individual client's gross recovery based on the determination that more than that percentage would be unreasonable because the work of individually retained attorneys primarily involved shepherding their clients through the settlement claims process.[137] In assessing the reasonableness of the presumptively allowed contingent fees, the court considered the "circumstances existing at the time the [fee agreement] is entered into, . . . the quality of the work performed, the results obtained, and whether the attorney's efforts substantially contributed to the result", as well as "whether subsequent events . . . rendered an agreement – that may have been fair at the time of contracting – unfair at the time of enforcement."[138] Lawyers with individual contingent fee contracts had the opportunity to petition for relief from the cap based on exceptional or unique circumstances, providing due process.[139]

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[136] *NFL*, 2018 WL 1635648, at *3. Note that the 11% awarded to class counsel and other qualifying common-benefit firms in *NFL* was the amount that had been requested by class counsel. Further, the court instructed the claims administrator to hold 5% back from all individual recoveries for future work administering the claims process.

[137] *NFL*, 2018 WL 1658808, at *3.

[138] *Id.* at *3 (quoting *McKenzie Constr., Inc. v. Maynard*, 823 F.2d 43, 45 (3d Cir. 1987).

[139] *Id.* at *4.

Although the *Vioxx* case involved a complicated opt-in resolution of individual personal injury cases rather than a class settlement, the court similarly capped contingent fee recoveries and made an assessment based on the *Johnson* factors of how fees should be allocated between common-benefit counsel and attorneys recovering based on individual contingent fee agreements.

The *Volkswagen* court employed a variant on the capped fee approach. The court concluded that private contingent fee attorneys conferred no benefit on the class beyond that achieved through the efforts of class counsel, who it determined were the only counsel entitled to attorneys' fees under the terms of the settlement agreement.[140] To protect class members from potentially unfair claims by their IRPAs seeking contingent fees, the court ordered that any settlement proceeds be paid directly to class members notwithstanding any "attorneys' liens, assignments, agreements for funds to be paid first into any attorney trust account, or any other functional equivalent whereby class members' recovery under the Settlement is reduced through private attorneys' fees."[141] The court then required any IRPA seeking to enforce a contingent fee agreement to "first provide his or her client with a copy of [the Court's order finding they conferred no benefit on the class], and to file a certificate of service with this Court."[142] Thus, although there was no express "cap" in *Volkswagen*, the court implemented a process to preclude

[140] Order, *Volkswagen*, MDL No. 2672, ECF No. 3178 at 2 (N.D. Cal. April 24, 2017).

[141] *Id.* at 2; *see also Volkswagen*, ECF No. 2428 (N.D. Cal. Dec. 5, 2016).

[142] *Volkswagen*, MDL No. 2672, ECF No. 2428 at 8.

unreasonable fee recoveries by counsel that would frustrate the settlement's purpose of providing all class members with recoveries on a consistent basis.[143]

The *NFL* and *Volkswagen* class actions are not precisely identical to this case, but the differences do not alter the conclusion that the Courts may apply their fee-capping approaches. For example, in *NFL*, the court's expert, Professor Rubenstein, justified the caps in part on the grounds that plaintiffs alleging cognitive impairment were uniquely vulnerable to overreaching, unlike Producers in this case.[144] But that argument does not undermine the fundamental point that farmers, most of whom are not experienced in the intricacies of class action and mass action litigation, are potentially vulnerable to overreaching in contingent fee agreements committing a substantial portion of any recovery to lawyers who would do limited work and rely on the work of other lawyers who will be compensated out of a common benefit fund.[145]

Similarly, while it is true that in *Volkswagen* one ground for the court's decision was that the settlement agreement did not provide for payment of attorneys' fees to attorneys other than class counsel, that does not undermine the court's finding that it had the authority to protect class members from the impact of contingent fee agreements benefitting IRPAs who did not provide service of any material value to the class.[146] In contrast, the Settlement Agreement here

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[143] *Id.* at 2; *see also* Order, ECF No. 2672 (entered Nov. 22, 2016) (settlement objective to make each plaintiff whole).

[144] Rubenstein *NFL* Report at 15.

[145] Conversely, we note that part of the justification for compensating IRPAs that existed in *NFL* is absent here. In *NFL*, the court recognized the value of assistance that IRPAs might provide in navigating a claims process requiring complex medical proof. *See* 2018 WL 1635648, at *8; *NFL*, 2018 WL 1658808 at *3, *4. In contrast, the Syngenta settlement has a simple claims form that requires minimal information from claimants and largely relies on government-provided data.

[146] *Volkswagen*, Order, ECF No. 3178 at 2, 6, 8.

specifically contemplates that attorneys' fees will be awarded to a wide range of attorneys who did work benefitting Class Members and that such awards may involve determinations about pre-existing contingent fee agreements.[147]

The Settlement Agreement also recognizes that the enforceability of any attorneys' fee contract affecting a Class Member is subject to judicial review. Section 9.21.1 of the Settlement Agreement provides that "The Court shall have exclusive jurisdiction to decide the enforceability of any lien, except that any lien for attorneys' fees and expenses arising out of the matters falling within Sections 9.18.2.1 and 9.18.2.2 shall be subject to the exclusive jurisdiction of the respective courts described therein." Sections 9.18.2.1 and 9.18.2.2 carve out certain attorneys' fee liens for attention by the specified courts. Section 9.18.2.1 provides that "Matters arising from client fee contracts . . . involving the law firm of Clark, Love & Hutson shall be subject to the jurisdiction of" the Illinois federal court. Section 9.18.2.2 provides that "Matters arising from client fee contracts . . . involving Class Members with claims pending at any time in *In re Syngenta Class Action Litigation* . . . shall be subject to the jurisdiction of the [Minnesota state court]."

Taken together, these sections contemplate judicial review of all attorneys' fee contracts and liens. They reflect the understanding of the drafters and signatories – who included all the members of the PSNC, including two who represented large numbers of contingent fee clients in individual lawsuits – that decisions regarding attorneys' fees could affect the ultimate amount of compensation received by a plaintiff. It was important to all parties to the negotiations – including those attorneys – that similarly situated plaintiffs would receive similar compensation

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[147] *See* Settlement Agreement § 7.2.1.

under the Settlement Agreement, and that individually represented plaintiffs would not receive a lower net recovery due to attorneys' fee obligations. At the same time, all parties recognized the need for attorneys representing individual clients to receive fair compensation and provided for it in the Settlement Agreement.

3. Rule 23 and the Rules Enabling Act

Federal Rule of Civil Procedure 23(h) does not require that an award of attorneys' fees be calculated using the private contingent fee percentages set forth in individual clients' agreements without regard to common fund principles. Rule 23, which governs awards of attorneys' fees and expenses in a class action, permits an award of "reasonable" attorneys' fees "authorized by law," where the law authorizes compensation to counsel who contributed to the creation or enhancement of a common fund.

Rejecting or ignoring all the authority recognizing the inherent power of courts to modify or even abrogate contingent fee agreements to protect clients and/or class members, certain law firms and their experts argue that any modification of their contingent fee agreements in the context of a Rule 23(h) fee award would violate the Rules Enabling Act, because it would construe Rule 23(h), a procedural rule, to abrogate a substantive contract right.[148] This argument is unpersuasive. As the text of Rule 23(h) and its comments make clear, it is a procedural rule, and any authority to award fees comes from other legal and equitable sources. Thus, to the

[148] *See, e.g.* Reply of Watts Guerra LLP in Support of its Application for Attorneys' Fees ("Watts Guerra Reply Memo"), ECF No. 3722, at 30-32, filed Sept. 17, 2018; Omnibus Response of Watts Guerra LLP in Partial Opposition to Fee & Expense Applications filed by Other Common Benefit and Retained Counsel, Exhibit 2 ("Fitzpatrick Expert Report") ECF No 3692, at 21-25, filed Aug. 17, 2018; *see also* Toups Reply Memo, ECF No. 3720, at 1 n. 1.

extent the Court abrogates or modifies contingent fee contracts, it will be exercising those legal and equitable powers, not impermissibly expanding the scope of Rule 23(h).

Even the law professor experts retained by movants who oppose modification of contingent fee agreements concede that the law does not create an inexorable command that contingent fee agreements always must be enforced as written. For example, they concede that

> It is true that the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS says that a contingent fee that was reasonable when made can become unreasonable later as a result of "a subsequent change in circumstances" that could not have been contemplated by the parties.[149]

The developments in this case, including the early appointment of leadership to supervise and coordinate work, class certification, and ultimately a class settlement, almost certainly were not contemplated by the parties when the contingent fee agreements were executed. (Indeed, given the experience in the *In re Genetically Modified Rice Litigation*, where a class was not certified, there was a significant question whether a class would be certified in this litigation.)

Moreover, changed circumstances are not the only ground on which contingent fee agreements can be abrogated or reduced. To the extent some of the contingent fee agreements were executed after the MDL and other consolidated proceedings established leadership and litigation protocols, the fee agreements raise the specter of overreaching, particularly if plaintiffs were not educated about the significance of these developments for the litigation process.[150]

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[149] See *id*. at Fitzpatrick Expert Report at 19.

[150] *See* Rubenstein *NFL* Report at 24-25 (citing cases regarding courts' inherent authority to protect litigants and the integrity of the legal process); *see also* KRPC 1.5(a). In addition, the Kansas Bar Association's Pillars of Professionalism, which have been adopted as aspirational goals by the Court in 2012, provide that a lawyer must "[b]e candid with clients about the reasonable expectations of their matter's results and costs." Pillar No. 2,

In sum, courts not only have the inherent legal and equitable authority to protect class members by capping contingent fees, they routinely exercise that authority.[151]

B. Weight to be Given to The Fee-Sharing Agreement Among Certain Counsel

On February 23, 2018, immediately subsequent to the signing of the Settlement Agreement, a Fee-Sharing Agreement was signed by representatives of three different plaintiffs' groups: (1) the Kansas MDL Leadership (Messrs. Stueve, Downing, Chaney, Powell, and Seeger); (2) the Minnesota Class Leadership (Mr. Gustafson); and (3) the representative of a significant number of individually represented plaintiffs who sued in the Illinois federal court, the Illinois state court, and other courts (Mr. Clark). Mr. Watts, the fourth PSNC member, who represented significant numbers of individually represented plaintiffs, most of whom sued in Minnesota state court, decided not to sign.[152]

The Fee-Sharing Agreement proposes that the attorneys' fees awarded by the court be divided as follows:

- 50% to the Kansas MDL leadership
- 12.5 % to the Minnesota class leadership

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http://www.ksd.uscourts.gov/wp-content/uploads/2018/03/180183-KC-District-Court-Book-2018-WEB.pdf.

[151] Other arguments, such as those by Watts Guerra LLP that their fee agreements cannot be capped because they are governed by Texas law, also lack merit. *See* Watts Guerra Memo at 6. Such arguments ignore the authority of courts over attorneys' fees in cases before them. *See* Rubenstein *NFL* Report at 17-19.

[152] Mr. Watts's colleague Mr. Cracken (who frequently stood in for Mr. Watts at settlement negotiations) not only opposed a class resolution but consistently disputed the proposed 20% allocation to Watts Guerra LLP and argued for more. Subsequent to the signing of the Settlement Agreement, some of Watts Guerra LLP's referring counsel have sued Mr. Watts. *See Kenneth P. Kellogg, et al. v. Watts Guerra, LLP, et al.*, Case No. 18-cv-2408-JWL-JPO, tagged to MDL No. 2591.

- 17.5% to the Clark/Phipps group.

It recommends that "[t]he remaining 20% of any attorneys' fees awarded by the Court will be allocated by the Kansas MDL Court, in consultation with the Minnesota MDL Court and Judge Herndon of the United States District Court for the Southern District of Illinois, taking into consideration the recommendation by the Special Masters."[153] Prior to Mr. Watts's withdrawal from the Fee-Sharing Agreement, this remaining 20% was to be allocated to Watts Guerra LLP as lead counsel for Minnesota individual plaintiffs, based primarily on the number of Producer Class Members purportedly represented by these counsel, as well as Mr. Watts's involvement in Minnesota bellwether and class trials and in the settlement discussions.

This Fee-Sharing Agreement is not binding on any of the Courts assigned responsibility to award and allocate fees under the terms of the Settlement Agreement, and no firm has argued that it is. The decision regarding the total amount of fees to be awarded and how it should be allocated among the many plaintiffs' lawyers seeking fees is within the sole discretion of the Courts.

That said, the Special Master recommends that the Courts give significant weight to this Fee-Sharing Agreement for the following reasons[154]:

Messrs. Seeger, Clark, and Gustafson were crucial members of the Court-appointed PSNC. In appointing these individuals, the Courts determined "that the Plaintiffs' Settlement

[153] The Fee-Sharing Agreement purports to identify which plaintiffs' counsel are included in each of the three groups whose representatives signed the fee agreement. We note that there is some ambiguity regarding the exact composition of these groups, which ambiguity is reflected in the fee petitions that sometimes take conflicting positions on these issues.

[154] *See* Fed. R. Civ. P. 23(h) 2003 comment ("Courts have also given weight to agreements among the parties regarding the fee motion, and to agreements between class counsel and others about the fees claimed by the motion.").

Negotiation Committee appropriately balances the goals of representing the interests of different groups of Producer plaintiffs while maintaining a workably sized group to conduct settlement negotiations."[155] The work of each of these individuals was critical to the achievement of a settlement in this litigation.

Mr. Seeger was the clear leader of the settlement effort on the plaintiffs' side, and without his efforts a settlement would not have been achieved. He worked tirelessly to persuade Messrs. Clark and Watts, who represented individual producer plaintiffs, to work with those supporting a class settlement, notwithstanding obstacles of personal and professional animosity that had to be overcome. Mr. Seeger also had to work with his own group – the Kansas MDL Leadership who had achieved class certification and a nine-figure verdict in a class trial – to achieve agreement on a class settlement and fee allocation that could be accepted by individually-represented plaintiffs and their counsel. A significant portion of the negotiations occurred with just Mr. Seeger, Ms. Smith (for Syngenta), and the Special Masters. Mr. Seeger was a skilled negotiator who was able to provide great assistance to the Special Masters in persuading Syngenta to get to a dollar amount sufficient to achieve a workable settlement.

Mr. Clark participated constructively in the settlement discussions, notwithstanding his initial opposition to class treatment of Producers and his views about the responsibility of the Grain Trade parties. He persuaded his co-counsel, Mr. Phipps, who was resolutely opposed to working with the Kansas MDL Leadership and equally opposed to a class solution, to support a class settlement. Mr. Clark modified his initial notions about structure of a settlement and worked collegially with Mr. Seeger to structure a settlement that he knew would benefit his many clients. Since implementation of the settlement, Mr. Clark has worked constructively to

[155] Order Appointing PNSC, ECF No. 3366 at 2-3.

encourage client participation, including encouraging his affiliate firms' Ethanol Production Facility clients who initially opted out of the settlement to revoke those opt-outs.

Mr. Gustafson, who is an experienced class action lawyer, was able to use the pressure of the ongoing Minnesota class trial and the volume of other litigation pending in Minnesota to assist in bringing Syngenta to a settlement. Throughout the negotiations, Mr. Gustafson was often a "voice of reason," which allowed him to find a way to bridge differences among the differing plaintiffs' counsel factions, including within the Minnesota leadership, in order to achieve a significant settlement for the benefit of the farmers. Mr. Gustafson's focus on finding sensible, common sense solutions to challenging issues made him uniquely able to interact with Syngenta counsel on contentious issues.

The negotiation of the Fee-Sharing Agreement did not take place in a vacuum. At the time it was negotiated, the litigation was sufficiently advanced (including class certification, opt-outs, and the class trials) that the entire PSNC had a reasonable sense of both the amount and value of work done by the various groups of lawyers and the numbers of clients they represented. To be sure, there was disagreement both as to certain aspects of the data and on their significance for the Fee-Sharing Agreement. But this information informed the discussions and led to a Fee-Sharing Agreement that accounted for the significant amount of work done for the benefit of the class.

In sum, without these individuals' willingness to overcome their personal and professional differences and work cooperatively for the benefit of the Producers and other plaintiffs whom they all represented, this unique settlement could not have been achieved. Accordingly, it is appropriate to give the Fee-Sharing Agreement substantial weight in making decisions about allocations of fees.

C. Applicability of the Joint Prosecution Agreements

The Watts Guerra LLP and Bassford Remele, P.A. submissions argue that the JPAs executed by groups of plaintiffs' counsel should govern decisions as to the allocation of fees in this class action context.[156] The Kansas MDL Leadership and Class Counsel submissions strongly oppose this position and argue instead that the JPAs did not contemplate and are inapplicable to the allocation of fees in a nationwide class action settlement context.[157]

The nationwide class action Settlement Agreement itself supports the conclusion that, even if the JPAs had addressed the eventuality of a nationwide class action settlement (which they do not), they were abrogated by the Settlement Agreement. That Settlement Agreement, to which Mr. Watts (who also is part of Minnesota Leadership and co-counsel with Mr. Remele) is a signatory, contains express language that it "supersedes all prior proposals, negotiations, agreements, and understandings relating to the subject matter of this Agreement."[158] The Settlement Agreement's subject matter specifically includes attorneys' fees, which are addressed in sections 7.2 and 9.18.

The responses by Class Counsel and the Kansas MDL Leadership correctly state the law and facts applicable here and should be adopted by the Courts. In particular, the JPAs are irrelevant to the award and allocation of fees in this nationwide class action settlement. Although these JPAs attempted to provide "up front" ground rules for the allocation of fees that

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[156] *See* Watts Guerra Memo at 10-13; Remele Fee Petition at 26-29.

[157] *See* Consolidated Response of Kansas MDL Co-Lead Counsel and Settlement Class Counsel Christopher Seeger to the Various Petitions for Attorneys' Fees and Expenses ("Kansas MDL Reply Memo"), ECF. No. 3693, at 61-70, filed Aug. 17, 2018.

[158] Settlement Agreement § 9.24.1.

might be recovered in multiple separate litigations, they have now been "overtaken by events," namely a nationwide class action settlement that they did not contemplate.

A few key documents shed light on this issue:

On June 18, 2015, Kansas MDL Leadership and prospective Minnesota Lead Counsel, including Watts Guerra LLP, executed an Amended and Restated Joint Prosecution Agreement in the Syngenta Litigation with Kansas MDL Leadership. This JPA defined "Common Benefit Assessment[s]" to mean "a common benefit fee and expense assessment ordered by a state or federal MDL court in connection with a state or federal MDL."[159] On June 22, 2015, a final revised Common Benefit Order ("CBO"), incorporating the JPA, was submitted to the Kansas federal court.[160] Mr. Watts, among others, was copied on the submission.[161] Neither Mr. Watts, nor anyone else, objected to the content of this final version, which expressly referenced the Bassford Remele, P.A./Sieben Group's, including Watts Guerra LLP's, rights and obligations under the JPA.[162] On July 27, 2015, the Kansas federal court entered this version of the CBO.[163] It summarized the JPA, in relevant part, as follows: "[Members of the Bassford Remele, P.A./Sieben Group] shall pay fee and cost assessments of fifty percent (50%) of the level ordered by this Court for MDL Counsel for all [non-MDL] clients."[164] The effective CBO contained the

[159] *See* Kansas MDL Reply Memo, Exhibit 1 Stueve Decl. at ¶ 111 (quoting JPA at § 1.b).

[160] *Id.*

[161] *Id.* at ¶ 112.

[162] *Id.*

[163] Order Establishing Protocols for Common Benefit Work and Expenses and Establishing the Common Benefit Fee and Expense Funds, ECF No. 936, entered July 27, 2015.

[164] *Id.* at 5. No one disputes that these assessments are recoverable expenses.

following language which makes clear the inapplicability of any "assessments" to a class settlement:

> In the event that there is a class settlement, recovery or judgment in favor of the class, no assessment pursuant to this Section will be made, either for attorneys' fees or for expenses, individually from any class member or his/her/its individual attorney as to the portion of any class recovery distributed to that individual class member if the class member remains in the class (i.e., does not opt-out of the class). Instead, all fees and expenses for that class member will come out of the overall class recovery funds provided by defendants, as approved by the Court, or as otherwise Ordered by the Court. The relationship between class counsel fees and costs obtained through any class settlement or judgment and the Common Benefit Fund will be addressed, if necessary, by later order of the court.[165]

This language makes clear that "assessments" only applied to individual recoveries and not to any class recovery. Further, the language contemplated that in the event of a class recovery, Kansas attorneys would be entitled to seek attorneys' fees and expenses from the overall class fund for anyone who remained in the class, unencumbered by the CBO or JPA assessments.[166] Class Counsel points out that during the negotiation of the JPA neither Watts Guerra LLP nor Bassford Remele, P.A. suggested that individual-case assessments set out in the CBO or JPA would limit, govern, or be a benchmark for the attorneys' fees available from a class settlement.[167] The agreement at the time obviously did not contemplate a world in which Watts Guerra LLP and the entire Minnesota Leadership, along with the Clark/Phipps group, would sign on to a nationwide class action settlement. Nevertheless, the JPA was clear that it did not govern what was to occur in the event of a class recovery. There is now a

[165] *Id.* at 20.

[166] *Id.; see also* Kansas MDL Reply Memo, Exhibit 1 Stueve Decl. at ¶ 114.

[167] *See* Kansas MDL Reply Memo, Exhibit 1 Stueve Decl. at ¶ 115.

nationwide class action settlement to which all the plaintiffs' counsel factions have agreed and in which their clients have submitted their claims. Accordingly, it is class action law and not the terms of the superseded JPAs that governs how fees are to be awarded and allocated.

This conclusion is confirmed by the First Addendum to the JPA ("Addendum to JPA" or "Addendum") executed in January 2016. That Addendum, for the first time, specifically addressed a fee-sharing agreement regarding a class action in the limited context of a Minnesota class. In that circumstance, Minnesota counsel agreed to pay a flat fee to Co-Lead Counsel of "$33^{1}/_{3}$ percent of the attorneys' fees awarded in all Minnesota MDL Class Actions."[168] The "Minnesota MDL Class Actions" were defined to mean "any action pursued in the Minnesota MDL Court" on behalf of a class of Producers or Non-Producers whether or not such class has been certified."[169] Thus, again, the JPA Addendum does not cover – and indeed, specifically excludes – any nationwide federal class action.[170] This Addendum confirms the understanding that the JPA-assessments applied only to individual cases. In a provision addressing what would happen if the Minnesota class were not certified, and one of the JPA parties prosecuted a putative Class Member's claims in "one or more individual actions," the agreement stated that the party would be "subject to all of the same rights and obligations of the Bassford Remele, P.A./Sieben Group including, but not limited to, ***the assessments on individual cases set forth therein*** [in the JPA]."[171] Again, this eventuality never occurred, and all the signatories subsequently signed on

[168] *Id.* at ¶ 117; *see also* Amended JPA at § 2.a.iv.

[169] Amended JPA at § 1.d.

[170] *Id* at § 1.c. ("Federal MDL Class Action means any action pursued in the Federal MDL Court on behalf of a class of Producers or Non-Producers....").

[171] *Id*. at § 3.b (emphasis added).

to a nationwide class action in federal court. Nonetheless, this JPA provision strongly supports the position that its assessment provisions were never intended to apply to a nationwide class action settlement.

As Class Counsel point out, the context in which Watts Guerra LLP and Bassford Remele, P.A. negotiated the JPA is further evidence of its inapplicability to the present situation. The premise of the JPA was an effort by Watts Guerra LLP to secure a process that would automatically exclude its clients from any class and correspondingly limit their common-benefit assessment on any individual recovery they secured.[172] It is inconsistent with this premise that the same JPA was meant to address the opposite scenario, wherein their clients elect to participate in a federal settlement class and in which they seek fees out of the common fund.

IV. SPECIAL MASTER RECOMMENDATIONS AS TO ALLOCATION OF THE TOTAL ATTORNEYS' FEE AWARD

A. All Attorneys' Fees Should be Paid from the Total Attorneys' Fee Award

While the attorneys' fee cases discussed above, including particularly the "hybrid" *NFL* and *Volkswagen* class action cases, are informative in defining the legal principles governing any award, none of them provides a methodology that fits exactly the unique circumstances of this case. The Syngenta settlement resolves multiple federal and state class actions, and mass actions in the Minnesota state court, the Illinois federal court, the Illinois state court, and elsewhere, unlike the other cases which were principally consolidated in one proceeding. It resolves claims of several hundred thousand plaintiffs, far more than in *NFL*. It involved one full trial to verdict and two other trials that had begun, in different jurisdictions. The IRPA lawyers with large

[172] *See* Watts Guerra Memo at 10.

numbers of clients, who pursued their claims as mass actions in multiple venues, provided significant consolidated litigation and settlement pressure on Syngenta on top of that provided by the class actions. To that extent, they provided a benefit to the entire Class.[173] And claims data available to date indicates that slightly fewer than half of the Class Members filing claims are represented by individual counsel.

All of this is relevant to the question of what fees may be awarded as "common benefit" fees pursuant to Rule 23(h) to be paid by the entire class. To the extent individual counsel representation played a substantial role in producing the class-wide benefit of a $1.51 billion nationwide class settlement through their work in litigation and settlement, it is clear under Tenth Circuit law that it is reasonable and fair for the class to pay for that effort from the common fund.[174] Thus, in this context, "common benefit" work is not limited to work approved by leadership counsel pursuant to CBOs; the circumstances of this case – and how it settled – support a more expansive definition.

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[173] The certification of class actions in the Kansas federal court and the Minnesota state court does not change this conclusion. First, the class certification rulings were uncertain until relatively late in the litigation and in any event would have been subject to appeal. Moreover, there were many Producers who were excluded from the litigation classes and who had lawsuits pending nationwide. These Producers included the thousands of Watts Guerra LLP clients who by definition were excluded from the Minnesota class and from the classes certified by the Kansas federal court, the thousands of clients that the Clark/Phipps group opted out from these litigation classes, and those Producers from states for which no class was certified subsequent to the Kansas federal court's Lanham Act decision. *See* Memorandum and Order re Class Certification, ECF No. 2547,at 12 (noting exclusion from class of thousands of Watts Guerra LLP clients "who filed suit in Minnesota state court on or before June 15, 2016, and who are represented by attorneys who executed a joint prosecution agreement with plaintiffs' co-lead counsel"); Watts Guerra Memo at 10 (describing JPA), 28 (describing "57,000 Watts Guerra Plaintiffs"); Clark/Phipps Memo at 12 ("Movants received and submitted over 16,000 opt-out forms" from the originally certified nationwide and state classes).

[174] *See Gottlieb*, 43 F.3d at 489 (including class action fee awards both to Class Counsel and to certain individual counsel).

The Attorneys' Fee Award also should be the source of payment in respect of IRPA work that primarily benefited individual contingent fee clients. *NFL* and *Volkswagen* took a different approach, leaving any contingent fee recovery to separate payments to IRPAs from their clients, subject to a cap or other restriction. This settlement requires a different approach, under which all fee payments will come from the common fund, for several reasons:

First, payment of IRPA fees from the Attorneys' Fee Award is a concept reflected in the Settlement Agreement, which was signed by all members of the PSNC, including Messrs. Clark and Watts, and which expressly contemplates that some IRPAs will recover from the Fee and Expense Award.[175]

Second, such payment is necessary to achieve the settlement's principle of providing similarly situated plaintiffs with similar recoveries. If IRPA fees in respect of individual work were paid solely by the individual clients, their recoveries would be less than those of Class Members without private attorneys.

Third, that principle and its implementation in connection with any fee award were essential to achieving the settlement. Absent such a principle, it would have been irrational for individually represented plaintiffs to consent to (and not opt-out of) a nationwide class settlement. Such mass opt-outs would have doomed the settlement. Conversely, the participation of these plaintiffs, and their attorneys' efforts to obtain their consent, was critical to achieving the settlement and, thus, benefited the entire class.

[175] Settlement Agreement §§ 7.2.1, 7.2.3, 9.18.2.

B. An "IRPA pool" of 10% of the Attorneys' Fee Award is Appropriate

The Special Master recommends that 10% of the Attorneys' Fee Award (approximately $50 million) be allocated to the IRPA pool and a 10% contingency fee cap. This is appropriate given the limited work done by IRPAs and the fact that common benefit awards would also be available to any IRPAs who had significant participation in the litigation or settlement process for the benefit of the Class. The IRPA pool would be allocated among IRPAs based on their clients' proportionate share of settlement recoveries by all claimants represented by IRPAs. If any amount remains in the IRPA pool after all the IRPAs have been paid, the remainder should be allocated proportionally among those lawyers who receive common benefit awards.

As of November 12, 2018, there were slightly over 228,000 claimants in the settlement, less than 48% (108,757) of which indicated they are represented by counsel.[176] A reasonable, conservative estimate is that approximately $950 million of the Gross Settlement Proceeds would be available for distribution to all claimants.[177] If it were to be distributed on a relatively equal basis among those who are represented and those who filed a claim *pro se,* the represented claimants would receive settlement awards totaling about $456,000,000 (48% of $950 million) – of which a 10% contingency fee would equal approximately $45.6 million of the $50 million proposed to be in the IRPA pool.[178] Obviously, the actual recovery of the represented claimant

[176] Atkinson Decl. at Ex. 2, Chart 1.

[177] This estimate deducts the full Attorneys' Fee Award (approximately $500 million), the full amount of expenses sought (approximately $48 million), and the full amount of the Service Awards sought (approximately $2.8 million) from the $1.51 billion Gross Settlement Proceeds, as well as making a conservative allowance for Claims Administration costs.

[178] The actual distribution of settlement awards between represented claimants and *pro se* claimants will not be determined until administration of the settlement is complete. It is possible that the assumption that the distribution is on a relatively equal basis may not be the case.

and thus the fee award of the lawyer will vary based on such factors as the size of the farm and thus the number of compensable bushels, the amount of "fed on farm," and the subclass status of the farmer (*e.g.*, Viptera or Duracade purchaser or not). Nonetheless, this suggests that an approximately $50 million IRPA pool has a reasonable likelihood of affording IRPAs a 10% contingent fee award for each Producer client.

A 10% contingent fee is obviously a significant reduction from the typical 30-40% contingent fee. However, it is appropriate given the history of this litigation. Most IRPAs did little more than recruit clients and in some cases fill out PFSs. The vast majority of the work of litigating legal issues, taking fact and expert discovery, arguing motions, trying cases, and settlement negotiation was done by the leadership lawyers in each jurisdiction. Moreover, given the simplicity of the Claims Process, which uses a short Claims Form that requires very limited information from claimants because the Claims Administrator will be using U.S. Department of Agriculture data to calculate compensation amounts, lawyer assistance in claims filing is of limited value – a conclusion confirmed by the fact that the majority (52%) of Claims have been filed *pro se*. And IRPAs remain eligible to recover reasonable litigation expenses. IRPAs who also performed litigation and settlement work that benefitted the class would be compensated both as IRPAs and for their common benefit work, as explained below.

Paragraph 17 of the Court's order preliminarily approving the settlement provides that lawyers "seeking attorneys' fees, expenses, or service/case contribution/incentive awards from the Settlement Fund must file a motion, including any supporting memoranda and materials, by the Fee and Expense Application Deadline." The order further indicates that the Fee and

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Nevertheless, given the limited information currently available, it is the most neutral, reasonable assumption.

Expense Application Deadline was July 10, 2018.[179] In addition, the Court ordered that all firms seeking awards were required to file spreadsheets with specified data and provide them to the Special Masters by August 3, 2018.[180]

The Courts could determine that the overwhelming number of firms providing data in response to these orders indicates that IRPAs were on notice of the need to make known to the Courts and the Special Masters that they sought fee and expense awards based on their representation of Class Members. Nonetheless, the Special Master recommends that the Courts should permit IRPAs to make application to this IRPA pool – within a specified time period – even if they had not previously submitted a petition or a spreadsheet.

The Special Master further recommends that the IRPA pool be administered exclusively by the Kansas federal court, in consultation with the Illinois federal court and the Minnesota state court, regardless of where an IRPA's cases were filed. Dividing the IRPA pool among multiple Courts would be unwieldy from an administrative perspective and would have the potential to result in different percentage fee awards in different Courts depending on the size of the pool and the number of attorneys making claims.

The Special Master also recommends that any IRPA making a claim for fees be required to produce, for review by the Special Master, a retainer agreement and/or a power of attorney from the Class Member on whose behalf the IRPA is claiming before it can be paid.

Finally, the Special Master recommends that, as in the *NFL* and *Vioxx* cases, a limited right of appeal to the Special Master be allowed where an IRPA believes that a fee award in

[179] ECF No. 3532 at 7, 10.

[180] ECF No. 3613.

respect to a particular Producer client is insufficient based upon unique and exceptional circumstances relating to that Producer client.[181] It is contemplated that this would be a right of appeal that would be used only under very limited circumstances and very infrequently.

C. Recommended Common Benefit Allocations among Kansas, Illinois, and Minnesota Courts

Assuming a 10% IRPA pool, 90% of the Attorneys' Fee Award would remain for common benefit allocations. Per Judge Lungstrum's November 15, 2018 Order, the Special Master is directed to make a Report and Recommendation "concerning the Court's initial allocation of its attorney fee award from the settlement fund."[182] The Special Master understands that this allocation should be among IRPAs seeking fees (as discussed above) and attorneys seeking common benefit fees in the Kansas federal court, the Illinois federal court, and the Minnesota state court. To do so, it is first necessary to assign the law firms who have filed petitions or data to litigation jurisdictions and, where possible, affiliated plaintiffs' counsel groupings.

1. Law Firm Groupings

The law firm grouping process required the Special Master to make determinations that not surprisingly were often far from clear cut or obvious. On multiple occasions, data for a particular firm were submitted both by itself and by other firms, and the hours and dollar amounts sought did not match up. Some counsel were "claimed" by several different plaintiffs' counsel groupings, and other lawyers claimed to be in a particular group that the leader of it did not list them as being a part of. Particularly among the three major Minnesota firms (Watts

[181] *See, e.g.*, *NFL*, 2018 WL 1635648; *In re Vioxx Prod. Liab. Litig.*, MDL No. 1657, 760 F. Supp. 2d 640 (E.D. La. 2010).

[182] ECF No. 3812.

Guerra LLP, Bassford Remele, P.A., and Gustafson Gluek PLLC), there was significant overlap and at times a lack of clarity as to what fees counsel sought. Where a firm submitted its own fee petition or data but was also named in a leadership firm fee petition or data submission, it was necessary to attempt to determine which entity had submitted the more accurate data and to eliminate duplicates. Some firms are in fact part of multiple groups.

Notwithstanding the overlap and ambiguity, it was necessary to attempt to impose some form of structure on the massive number of submissions in order to consider how allocation of fees could be done. A brief summary of the categorization process (which certainly involved some judgment calls) follows.

The attorney groupings were first organized by the three jurisdictions whose courts have overseen the litigation since before the parties reached a settlement – the Kansas federal court, the Illinois federal court, and the Minnesota state court. Within these jurisdictions, the leadership groups who performed common benefit and/or significant litigation work were identified.

In Kansas, MDL Leadership, including Settlement Class Counsel Patrick Stueve and Christopher Seeger, and the law firms Stueve, Siegel, Hanson, LLP; Wynn, Newell & Newton, LLP; Gray, Ritter & Graham, PC; Gray Reed & McGraw, LLP; and Seeger Weiss LLP and their affiliated counsel, comprised the largest group. Other firms whose claimed work appears primarily to have been done in the MDL but were not part of the leadership group included Beasley, Allen, Crow, Methvin, Portis & Miles, P.C.; Wagstaff & Cartmell, LLP; the Coffman Law Firm; a consortium of Benjamin Marshall & Associates, Pendley, Baudin & Coffin L.L.P. and Saeed & Little, LLP; and their various affiliated firms.

In Illinois, two major groups emerged – (i) the Clark/Phipps group, led by Clark, Love & Hutson, G.P. and Phipps Anderson Deacon, LLP and (ii) the Heninger Garrison Davis, LLC group, each claiming significant common benefit and litigation leadership roles but unaffiliated with the other.[183] Each of those groups also claimed a defined set of affiliated firms.

In Minnesota, there are three major groups. "Gustafson Class" comprises those firms who led the Minnesota class representation and settlement negotiations. "Remele Watts" includes counsel who represented a significant portion of the individual claimants involved in the Minnesota litigation and ultimately included in the nationwide class. Where law firms appeared to fall squarely into either the "Gustafson Class" group or the "Remele Watts" group according to the firm or group's submission, they were categorized accordingly. Many firms, however, including Watts Guerra LLP and Bassford Remele, P.A. themselves, performed both common benefit and settlement work for the class (as detailed in the Gustafson Gluek PLLC submission and exhibits), and litigation work for individual plaintiffs (as detailed in the spreadsheets submitted by Watts Guerra LLP for the firms). In such cases, those law firms were assigned to a "Hybrid (Remele/Watts/Gustafson)" group to account for their participation in both functions.

Attached as Exhibit 2 is the Special Master's placement of law firms seeking common benefit fees in an appropriate jurisdiction and in an appropriate affiliated counsel group. The factors considered in determining where a particular law firm should be placed included such factors as where that firm had filed lawsuits and appeared in court; where that firm had filed its

[183] The Law Offices of A. Craig Eiland, PC also represented 1146 producers and landlords in litigation against Syngenta, including more than 834 clients in the Illinois state court. *See* Declaration of A. Craig Eiland in Support of the Eiland Law Firm's Motion for Award of Attorneys' Fees and Reimbursement of Expenses ¶¶ 3, 14, ECF No. 3593-1, filed July 10, 2018.

fee petition; which leadership group, if any, "claimed" that firm; whether the firm was identified as part of a group in the Fee-Sharing Agreement; and the Special Master's understanding of the alliances among the hundreds of law firms in this sprawling litigation.

By placing a law firm within a jurisdiction and/or affiliated counsel group, the Special Master does not offer an opinion or make a recommendation in this Report and Recommendation as to whether or to what extent a particular firm may be entitled to common benefit fees. That decision is to be made subsequently by the relevant Court in each jurisdiction. It is worth noting that many of the firms who have submitted fee petitions appear only to be seeking awards based on representation of individual clients – which would put them in the IRPA pool – and not to be seeking common benefit awards. It is likely that many, if not most, of the firms who will receive common benefit awards also will be eligible for awards from the IRPA pool.

2. Allocations Among Jurisdictions

In making a recommendation as to how to allocate the common benefit portion of the Attorneys' Fee Award (90% of the approximately $500 million) among the three Courts, the Special Master has considered the contributions of the attorneys in each jurisdiction to the overall litigation and the settlement. This determination takes into account the history of the litigation, the available data regarding attorney hours incurred[184], and the experience of Special Master Reisman and Special Master Stack in connection with settlement negotiations and

[184] The data include hours that submitting firms defined as "Common Benefit Hours" as well as total hours. There is some inconsistency and dispute among firms as to what hours are properly considered "Common Benefit Hours." After reviewing the data and the contributions of the various firms to the overall litigation and the resulting settlement, the Special Master concludes that it is appropriate to consider not only the designated Common Benefit Hours but also total hours in evaluating contributions to the result here. What is most relevant in assessing contributions that benefitted the Class is not the characterization of the time, but the actual tasks performed.

implementation. The Special Master also has considered the terms of the Fee-Sharing Agreement.

Because of the extremely complex nature of the litigation and the settlement process, and the multiple ways in which lawyers contributed to (or hindered) achievement of the settlement, there is, necessarily, some element of judgment involved. Nevertheless, the Special Master has sought to take into account the relevant factual information available to reach a reasoned determination.

The Fee-Sharing Agreement would award 50% to the Kansas MDL Leadership, 17.5% to the Clark/Phipps group, and 12.5 % to the Gustafson group. 20% would remain for the Watts Guerra LLP and Bassford Remele, P.A. groups, and all other groups seeking common benefit fees (as well as the IRPAs). While the relative proportions of the Fee-Sharing Agreement among its signatories are reasonable, and it deserves significant weight, some modification is appropriate to assure adequate compensation for all counsel claiming fees.

The hours data submitted by the various firms is also informative, but not dispositive, in allocating the common benefit portion of the Attorneys' Fee Award among the three jurisdictions. Firms assigned to the Kansas federal court claimed a total of 38.13% of the total attorney hours and 40.58% of the common benefit attorney hours; firms assigned to the Minnesota state court claimed a total of 48.12% of the total attorney hours and 45.15% of the common benefit attorney hours; and firms assigned to the Illinois federal court claimed a total of 13.74% of the total attorney hours and 14.27% of the common benefit attorney hours.[185] To rely

[185] Firms submitted hours for attorneys (including contract attorneys) and non-attorneys. The figures in this paragraph reflect only attorney hours.

on these overall attorney hours without further analysis could, however, yield a result that would not fairly reflect the common benefit to the Class of the work done by each group. As is apparent to any practicing lawyer, an hour spent in a trial, at an expert deposition, or successfully litigating a dispositive motion is far different from an hour doing file management or document review. Accordingly, it is appropriate to consider not just the total number of attorney hours, but how those hours were spent.

Almost 15% (over 50,000 hours) of all attorney time submitted consists of hours claimed to have been spent by Minnesota attorneys alone in preparing plaintiff fact sheets.[186] While there is certainly an argument that completing PFSs, and thus keeping the individual Minnesota litigation moving, helped to push Syngenta toward settlement, these hours cannot be treated as equivalent to hours spent in trial, successfully litigating dispositive motions, or doing expert work or fact discovery against Syngenta. In those important categories, the Kansas lawyers spent substantially more time than those in Minnesota or Illinois.

Using the submitted data, as well the Special Master's knowledge of the various roles in the litigation and settlement process, the Special Master makes the following recommendations:

a. Kansas

The law firms for whom the Special Master recommends common benefit award would be made by the Kansas federal court are primarily the Kansas MDL Leadership group (consisting of 56 law firms), but also approximately 39 other law firms. *See* Exhibit 2.

[186] If one were to include non-attorney time, the Minnesota PFS time would be over 500,000 hours.

The Special Master recommends that the Courts assign 50% of the Attorneys' Fee Award to be allocated among firms grouped in the Kansas federal court. The Kansas group not only took on a leadership role in the federal MDL, it conducted and coordinated massive fact and expert discovery against both Syngenta and third parties spanning multiple countries and at substantial expense. It also obtained significant rulings on complex legal issues, including removal issues that cleared the path for state court litigation and responses to Syngenta's motions to dismiss and for summary judgment. The Kansas group pursued and obtained certification of both a nationwide class and eight statewide classes, again surmounting complicated legal hurdles. Perhaps most significantly, it tried the Kansas class litigation to a $217.7 million verdict. Their submitted hours reflect the work done to accomplish that result. In light of that verdict, participation of the Kansas MDL Leadership in a nationwide class settlement was critical to its success.

In addition, Mr. Seeger was the leader of the PSNC, and there is no doubt that without his involvement, a settlement is unlikely to have been achieved – certainly not in the same timeframe or at the same amount. The experience with large scale settlements that he brought to the table, his unique ability to bridge the worlds of plaintiff class action lawyers and plaintiff mass tort lawyers, his willingness to devote significant time to this effort (notwithstanding his many other obligations), and his perseverance and creativity all contributed to the size of the award recommended to be allocated by the Kansas federal court.

b. Minnesota

The Minnesota petitions and data submissions have significant overlap among the Gustafson, Watts Guerra, and Bassford Remele groups, with many firms appearing to be in multiple groups among them. This likely derives at least in part from the close working

relationship that appeared to exist between those lawyers in Minnesota supporting a class and those representing individual claimants.

Unquestionably, the Minnesota state court litigation both advanced the cause of pressuring Syngenta on multiple fronts, and, through coordination with Kansas counsel, assisted the nationwide class effort. Minnesota counsel simultaneously pursued a class action and a significant number of individual suits. The combination of those groups resulted in the specter of multiple bellwether trials for Syngenta, with corresponding discovery burdens and the development of new experts to compliment those developed in the Kansas MDL litigation. Although the *Mensik* bellwether trial never proceeded to verdict, Minnesota counsel forced Syngenta to divide its resources and fully work up the case through opening statements. And the settlement was reached in the midst of the Minnesota class trial.

The Minnesota lawyers did not have a unitary position in the settlement negotiations. Class Counsel, particularly Mr. Gustafson, worked hard to bridge the gap between the Kansas, Minnesota, and Illinois factions in order to achieve a favorable result for all Producers. Mr. Remele, who represented a substantial portion of individual plaintiffs in Minnesota, likewise participated in early group settlement discussions, presenting a damages model with Mr. Watts that differed from other plaintiffs' groups. Mr. Watts and his affiliated counsel Mr. Cracken insisted for much of the negotiation on a settlement structure with which both Syngenta and other plaintiffs' counsel disagreed. Ultimately however, Minnesota class counsel and Kansas MDL counsel worked with Mr. Watts to address Mr. Watts's concerns and to secure his inclusion, and the inclusion of the many individual plaintiffs he represented, in a class resolution.

c. Illinois

The Illinois federal and state court litigation presented an important third pressure point on Syngenta to resolve the growing litigation against it. In Illinois federal court, the *Tweet* and *Poletti* cases involved briefing and discovery for thousands of plaintiffs, whom Illinois counsel also worked to opt out of the Kansas class. Heninger Garrison Davis, LLC assisted Kansas MDL leadership in their discovery against Syngenta. In the state court litigation, the Clark/Phipps group pursued cases for hundreds of additional farmers, forcing Syngenta to respond to even more briefing on issues ranging from preemption to the economic loss doctrine.

From a settlement perspective, Illinois counsel initially presented a significant barrier to resolution. Mr. Phipps in particular was fundamentally opposed to a class solution and pressed hard to proceed with individual litigation. After Syngenta made clear that piecemeal resolution was not an option, Mr. Clark's agreement to participate, and more importantly his work in convincing Mr. Phipps' group to participate in a nationwide class action settlement, was critical to its success.

* * *

Accordingly, the Special Master recommends the following allocation of the Attorneys' Fee Award:

- Kansas federal court: 50%
- Minnesota state court: 24%
- Illinois federal court: 16%
- IRPA pool (to be administered by Kansas federal court): 10%

See Table 1 below for a precise breakdown of dollars to be allocated. It is of course contemplated that these amounts would be apportioned further among the lead firms and their referring and affiliated firms, as well as other firms seeking fees, in a manner to be determined by the court in each jurisdiction, subject to the dispute resolution provisions of Settlement Agreement Section 7.2.3. And, as noted, many firms obtaining common benefit funds also will be eligible to recover from the IRPA pool.

Table 1

Distribution Among Jurisdictions

Gross Settlement Proceeds	$ 1,510,000,000.00
Attorneys' Fee Award	$ 503,333,333.33

Allocation	Percentage	Dollars
KS Federal Court Common Benefit	50%	$ 251,666,666.67
MN State Court Common Benefit	24%	$ 120,800,000.00
IL Federal Court Common Benefit	16%	$ 80,533,333.33
IRPA Pool (KS Federal Court)	10%	$ 50,333,333.33
TOTAL	**100%**	**$ 503,333,333.33**

V. SPECIAL MASTER RECOMMENDATIONS AS TO AWARD OF EXPENSES

Requested reimbursable expenses total $48,842,866.12. All Class Counsel and most of the principal groups of counsel support an award of reimbursable expenses in addition to and separate from attorneys' fees. These include: (1) the Kansas MDL Leadership, including Class Counsel Seeger and Stueve[187], (2) Minnesota Co-Lead Counsel (Gustafson Gluek PLLC),

[187] Kansas MDL Fee Memo at 1, ECF No. 3587, filed July 10, 2018 (Requesting "that the Court award one-third of the $1.51 billion settlement fund to be set aside for attorneys' fees ("Fee Request") and, to reimburse Co-Lead Counsel and other MDL firms . . . $6,695,350.05 in costs and expenses . . . ("Expense Request").

including Class Counsel Gustafson[188]; and the (3) the Clark/Phipps group.[189] That approach is consistent with the practice in many courts, and the Special Master recommends following it here.[190]

A review of the expense submissions of the various counsel, which are set forth both in written fee and expense requests filed on or about July 10, 2018, as well as in the Excel spreadsheets mandated by the Court to permit analysis of claimed expenses through reasonably consistent categorization was undertaken.[191] The materials submitted by counsel are summaries and do not include detailed itemization or supporting receipts, although counsel have stated that they can provide such detail.

[188] Gustafson MN Class Memo at 4 (seeking "an attorneys' fees award of 33 and 1/3 of [the] total settlement fund plus reimbursement of reasonable expenses"), 54 ("requesting that the Court also award reimbursement of reasonable costs and expenses incurred").

[189] *See* Clark Phipps Memo at 2 (requesting portion of "one-third fee" as attorneys' fees), 3 (Illinois Leadership Group also seeks reimbursement of their reasonable and necessary litigation expenses").

[190] *See, e.g., In re AT & T Corp.*, 455 F.3d 160, 169 (3d Cir. 2006) (affirming fee and expense award where district court awarded expenses in addition to attorneys' fees).

[191] *See* ECF No. 3613.

The requested expenses break down by category as follows:

Table 2

Summary of Expenses by Category

	Sum of Expenses	% of Total
Air Travel	$ 1,878,199.80	3.85%
Common Benefit Assessment Fees	$ 10,313,172.44	21.11%
Court Fees	$ 1,440,006.32	2.95%
Expert/Consulting Fees Not Included in Common Benefit	$ 4,606,662.64	9.43%
Ground Transportation	$ 348,934.56	0.71%
Hotels	$ 1,902,098.00	3.89%
Meals	$ 696,259.83	1.43%
Mileage	$ 563,569.61	1.15%
Miscellaneous	$ 21,156,330.06	43.32%
Photocopying	$ 2,525,759.91	5.17%
Postage	$ 2,770,283.87	5.67%
Special Master Fees	$ 560,906.63	1.15%
Transcript Fees	$ 80,702.46	0.17%
Grand Total	$ 48,842,886.12	100.00%

A. Criteria for Evaluating Expenses

A starting point for evaluating the reasonableness of litigation expenses is the orders of the Court that appointed lead counsel and interim lead class counsel and addressed reimbursable litigation expenses.[192] On July 27, 2015, the Kansas federal court issued the CBO which established protocols for common benefit work and expenses and establishing common benefit fee and expense funds.[193] Although the CBO addressed only common benefit expenses, and not expenses related to individual clients, it provides useful standards for evaluating the

[192] *See* Fed. R. Civ. P. 23(h) and 2003 comment ("If costs were addressed in the order appointing class counsel, those directives should be a presumptive starting point in determining what is an appropriate award.")

[193] *See* CBO, ECF No. 936.

reasonableness of litigation expenses for which reimbursement is sought.[194] Notably, it was developed with the input of leadership in the Kansas federal court and Minnesota state court litigation.[195] Its terms are generally consistent with similar orders routinely issued in complex multidistrict or mass tort litigation, as well as the expense reimbursement standards typically applied by business clients in commercial litigation. For those reasons, and because their announcement early in this litigation provided notice to litigating counsel, it is reasonable to use these standards in evaluating expense applications.

The standards that are particularly pertinent include the following:

1. Limitation of reimbursable airfare expense to the lowest available, convenient coach airfare;
2. Limitation of hotel charges to average reimbursable room rates at business hotels in the relevant city; and
3. Limitation of meal expenses to reasonable amounts.[196]

The standards also are noteworthy for items that are not included, because they typically are considered firm overhead, rather than compensable litigation expenses. These include office rent and utilities, and advertising and other expenses related to client recruitment or entertainment.

[194] *Id*. at 12-14.

[195] *See id.* at 3, 5-6.

[196] *Id.* at 12-15.

B. Evaluation of Expense Applications

With these standards in mind, a review has been done of the materials submitted to date. Additional information is required to evaluate fully the expense requests to make final recommendations. However, at this stage it is possible to draw certain preliminary conclusions regarding certain expense items warranting further consideration.

There are a few types of expenses that even on a high level of review stand out as noteworthy:

1. Common Benefit Assessments

The Common Benefit Assessments of $10,313,172.44 constitute approximately 21 % of the requested expense reimbursement. These assessments paid by plaintiffs' counsel, which were necessary to fund the litigation and were paid consistent with the CBO and the other courts' common benefit orders, clearly benefited the Class. Moreover, both Kansas MDL Leadership and Minnesota Leadership submitted affidavits detailing expenses and describing a process for review to ensure compliance with the requirements of the relevant Common Benefit Order regarding reimbursable expenses.[197] This provides a strong indication that these Common Benefit Assessments were reasonably incurred litigation expenses.

2. Miscellaneous Fees

Certain firms, and particularly those who represent large numbers of individual clients, have submitted large amounts of expenses that they categorized as "Miscellaneous" on the Court-required Excel spreadsheets. The "Miscellaneous" category totals $21,156,330.06, or

[197] *See* Stueve Decl. ¶¶ 653-58, 671-74; Gustafson Decl. ¶¶ 77-78.

more than 43% of the total expenses.[198] Approximately $8.2 million of this amount is reported by one firm litigating in Minnesota and nearly $9 million is reported by other firms litigating in Minnesota. Another $1.4 million is reported by firms litigating primarily in Illinois federal court. An examination of the information provided regarding these "Miscellaneous" expenses indicates that, particularly for the groups with large expenses in this category, at least some of those expenses appear to be primarily marketing and client acquisition costs and costs that normally would be regarded as overhead. Others, however, may be related to communications with existing clients regarding ongoing litigation issues, including issues related to the structure, amount, and timing of any potential settlement. The Special Master believes that such expenses may appropriately be reimbursable litigation expenses, because they were necessary for the conduct of the litigation and, ultimately, facilitated the settlement.

The Special Master recommends additional review of all Miscellaneous expenses in excess of $100,000. In the first instance, firms with Miscellaneous expenses in excess of that amount should be required to review their own expenses to determine whether they qualify as reimbursable litigation expenses in accord with the principles set forth above, and afforded the opportunity to submit revised expense applications. To the extent such firms claim Miscellaneous expenses, they should be required to submit documentation sufficient to establish that the requested expenses qualify for reimbursement under the principles set forth above.

3. Air Travel and Meal Expenses

There appear to be disproportionately large air travel and meal expenses for certain firms with large inventories of individual claims. These may warrant further review to determine

[198] *See* Table 2 above.

whether any of them are properly viewed as client acquisition costs, as opposed to litigation expenses, and whether they are consistent with the principles set forth above. To the extent that such firms claim Air Travel expenses in excess of $200,000 and Meal expenses in excess of $50,000, they should be required to submit documentation sufficient to establish that the requested expenses qualify for reimbursement under the principles set forth above. In particular, with respect to Air Travel expenses, they should be required to show that the requested reimbursement is for no more than convenient coach airfare for work related to active litigation, as opposed to initial client solicitation. Similarly, Meal expenses should be reimbursable for client meetings for active litigation, but not for initial solicitation.

* * *

Accordingly, the Special Master recommends that the Court enter an Order (1) approving expenses in an amount up to $48,842,866.12; (2) confirming the expense reimbursement criteria set forth above; (3) authorizing the Special Master to perform additional review of expenses, including requesting supplemental documentation required for the additional review described above; and (4) directing the Special Master to provide a further Report and Recommendation to the Court after completion of the additional review.

VI. SPECIAL MASTER RECOMMENDATIONS AS TO SERVICE AWARDS

Settlement Agreement § 7.2.4 provides that firms can petition the Court for "Plaintiff Service Awards for the representative plaintiffs and bellwether plaintiffs" in recognition of their service to the Class. Several firms have requested such awards, in the total amount of $2,782,500. Each plaintiff and the corresponding requested service award is listed in Exhibit 3 (Proposed Service Awards).

Although leadership in the various jurisdictions took differing positions on categorizing and allocating service award amounts for representative plaintiffs, all of the methodologies and amounts appear reasonable.

- Kansas MDL Class Counsel proposes four categories of awards : (1) $5,000 each for the 20 plaintiffs who participated in written discovery beyond Plaintiff Fact Sheets; (2) $15,000 each for the 65 plaintiffs who participated in more extensive discovery and were deposed and for class representative and bellwether plaintiff Rail Transfer, Inc.; (3) $100,000 each for the 4 plaintiffs who participated in more extensive discovery, were deposed, and testified at trial; and (4) $2,500 each for the 3 subclass representatives who assisted in negotiating the subclass allocations.
- In the Illinois federal court, Heninger Garrison Davis, LLC requests a flat fee of $5,000 each for all 44 *Poletti* plaintiffs who were deposed, for a total of $220,000.[199]
- In Minnesota state court, Watts Guerra LLP and Gustafson Gluek PLLC submitted largely overlapping lists of representative plaintiffs and bellwether plaintiffs.[200] Gustafson Gluek PLLC requests $100,000 for each of the three plaintiffs who engaged in full discovery, class certification, and trial preparation, and $15,000 for each of the 40 plaintiffs who participated in full discovery but did not partake in trial preparation.[201] Watts Guerra LLP, on the other hand, includes

[199] Garrison Fee Memo at 22-24. Heninger Garrison Davis, LLC is the only firm in the Illinois litigation that is seeking service awards on behalf of plaintiffs.

[200] *See* Watts Guerra Memo, Exhibit 4, Watts Decl. ¶ 137; Watts Guerra Memo at 24-25; Gustafson Minnesota Class Memo at 48.

[201] *See* Gustafson Minnesota Class Memo at 48-50.

11 plaintiffs not mentioned by Gustafson Gluek PLLC, but does not specify the requested allocation amount on any of the listed plaintiffs.[202] These 11 plaintiffs engaged in discovery but did not participate in trial preparation.[203] Under the proposed Gustafson Gluek PLLC methodology, these 11 plaintiffs would be allocated $15,000 each.

* * *

The Special Master believes that all of the requested service award categories and amounts sought are fair and reasonable. Accordingly, the Special Master recommends the Courts approve the service awards as set forth in Exhibit 3.

VII. CONCLUSION

The Special Master respectfully recommends that the Courts allocate the Attorneys' Fee Award among jurisdictions and in an IRPA pool in the manner set forth above; enter appropriate orders regarding expense reimbursement consistent with section V above; and approve service awards as set forth in section VI above.

Respectfully submitted,

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[202] *See* Watts Guerra Memo, Exhibit 4, Watts Decl. ¶ 137

[203] *See* Watts Guerra Memo, Exhibit 4, Watts Decl. App. D.